146 U S 303

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 252. 26

BENJAMIN F. BUTLER, PLAINTIFF IN ERROR,

vs.

CHARLES P. GORELEY, ASSIGNEE OF ISAAC H. TAYLOR.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

FILED OCTOBER 15, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 252.

BENJAMIN F. BUTLER, PLAINTIFF IN ERROR,

vs.

CHARLES P. GORELEY, ASSIGNEE OF ISAAC H. TAYLOR.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 16, 1891.

1 COMMONWEALTH OF MASSACHUSETTS:

[Seal of the Superior Court.]

I, Lincoln Flagg Brigham, chief justice of the superior court of the Commonwealth of Massachusetts, do certify that Jos. A. Willard, Esq., whose signature is affixed to the papers hereunto annexed, is clerk of said superior court within and for the county of Suffolk and hath the keeping of the files, records, and proceedings of said court within and for said county; also of the late court of common pleas within and for said county and of the late superior court of the county of Suffolk aforesaid; that he is by law the proper person to make out and to certify copies of the files, records, and proceedings of said several courts; that full faith and credit are and ought to be given to his acts and attestations done as aforesaid, and that his attestation to the papers hereunto annexed, being numbered 1 to 18, inclusive, of the files, records, and proceedings of the said superior court is in due form.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be hereunto affixed this second day of October, in the year of our Lord one thousand eight hundred and eighty-eight.

LINCOLN F. BRIGHAM,
Chief Justice of the Superior Court.

2 UNITED STATES OF AMERICA, *ss.:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the superior court of the Commonwealth of Massachusetts, holden at Boston, within and for the county of Suffolk, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court, before you or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between Charles P. Goreley, assignee, plaintiff, and Benjamin F. Butler, defendant, in an action of contract, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we, being willing that error, if any hath been, should

be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Samuel F. Miller, senior associate justice of the said Supreme Court, the thirtieth day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
LINCOLN F. BRIGHAM,
Chief Justice of the Superior Court.

3 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

And now, here, the judges of the superior court make return of this writ by annexing hereto and sending herewith, under the seal of the said superior court *court*, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, Jos. A. Willard, clerk of said superior court, have hereto set my hand and the seal of said court this fourth day of October, A. D. 1888.

JOS. A. WILLARD, *Clerk.*

4 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

To all persons to whom these presents shall come, Greeting:

Know ye that among our records of our superior court for said county of Suffolk it is thus contained, the following being the entire record in the case:

COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

To the sheriffs of our several counties or their deputies, Greeting:

[L. S.] We command you to attach the goods or estate of Benjamin F. Butler, of Lowell, in our county of Middlesex, having his usual place of business in Boston, in said county of Suffolk, to the value of ten thousand dollars, and summon the said

defendant (if he may be found in your precinct) to appear before our justices of our superior court, to be holden at Boston, within and for our said county of Suffolk, on the first Monday of November next, then and there in our said court to answer unto
5 Charles P. Goreley, as he is the assignee in insolvency of the estate of Isaac H. Taylor, insolvent debtor, in an action of contract; and the plaintiff says that the defendant is indebted to the plaintiff, as assignee of the estate of Isaac H. Taylor, insolvent debtor, in the sum of fifty-eight hundred and seventy-four dollars and fifteen cents ($5,874.15) for money received by the defendant for the use of the plaintiff, as assignee as aforesaid, and interest thereon from April 6, 1885.

Particulars of Demand.

The plaintiff seeks to recover of the defendant in this action said sum of $5,874.15, being the amount received by the defendant on April 6, 1885, from the Treasury of the United States or upon a draft issued by the Treasurer of the United States for or in payment of a judgment recovered on or about January 31, 1885, against the United States in the Court of Commissioners of Alabama Claims in the name of said Isaac H. Taylor, as plaintiff, in case No. 5725 in said court, upon one of the claims known as the Alabama claims for the sum of $5,874.15 existing in favor of and belonging to said Isaac H. Taylor on June 20th, 1883, at the time of his filing his petition in insolvency in the court of insolvency for said county of Suffolk, and which was on July 20th, 1883, by the judge of said court of insolvency, by an instrument under
6 his hand, assigned and conveyed to the plaintiff, as assignee of the estate of said Isaac H. Taylor, in insolvency, and which passed and belonged to the plaintiff, as assignee as aforesaid, and interest thereon from April 6, 1885.

Second count for the same cause of action.—And the plaintiff further says that on June 20th, 1883, said Isaac H. Taylor, then of said Boston, filed his petition in insolvency in the court of insolvency for said county of Suffolk to be adjudicated an insolvent debtor; that said Taylor was thereupon adjudicated an insolvent debtor; that the first meeting of his creditors was held July 20th, 1883, at which the plaintiff was chosen assignee of the estate of said Taylor, insolvent debtor; that on the 20th day of July, 1883, the judge of said court of insolvency, by an instrument under his hand, assigned and conveyed to the plaintiff, as assignee as aforesaid, all the estate, real and personal, of the said Isaac H. Taylor, insolvent debtor, including all the property of which the said Taylor was possessed or which he was entitled to on the 20th day of June, 1883, excepting such as may be by law exempted from attachment, with all his deeds, books, and papers relating thereto; that on the 20th day of June, 1883, and prior thereto there existed in favor of and belonging to said Isaac H. Taylor a claim against the United States, being one of
7 the claims known as the Alabama claims, pending in the Court of Commissioners of Alabama Claims, for about six

thousand dollars, which claim passed and belonged to the plaintiff, as assignee as aforesaid, by force of said assignment and conveyance and of the laws of the Commonwealth of Massachusetts, on which claim a judgment was recovered on or about January 31st, 1885, against the United States in the name of the said Isaac H. Taylor, as plaintiff, in said Court of Commissioners of Alabama Claims, in case No. 5725, but for the use and benefit of the plaintiff, as assignee as aforesaid, for the sum of $5,874.15; and the plaintiff further says that said judgment was paid on April 6, 1885, by the United States or the Treasurer of the United States, and said defendant received the whole amount thereof in current money, to wit, the said sum of fifty-eight hundred and seventy-four dollars and fifteen cents, on said sixth day of April, and now holds the same in his possession and control, and owes the plaintiff said sum *sum* of $5,874.15 and interest thereon from April 6, 1885. Both of said counts are for the same cause of action.

By his att'y, W. H. H. ANDREWS.

8 To the damage of the said plaintiff (as he says) the sum of ten thousand dollars, which shall then and there be made to appear with other due damages; and have you there this writ with your doings therein.

Witness Lincoln Flagg Brigham, Esquire, at Boston, the twentieth day of October, in the year of our Lord one thousand eight hundred and eighty-six.

JOS. A. WILLARD, *Clerk.*

On which said writ is the following acknowledgment of service:

I, the within-named Benjamin F. Butler, hereby accept service of the within writ, returnable and to be entered on the first Monday of November, A. D. 1886, as within written and stated.

BENJ. F. BUTLER,
By FRANK L. WASHBURN,
His Attorney.

On said first Monday of November, A. D. 1886, the plaintiff, assignee as aforesaid, appeared, by W. H. H. Andrews, Esquire, his attorney, and entered the above action; and the defendant also appeared, by F. L. Washburn, Esquire, his attorney, and on the ninth day of said November, 1886, the following appearance was filed, to wit:

9 SUFFOLK, *ss:*

Superior Court, —— Term, 188–.

GORELY, Assignee, Pl'ff,
v.
BENJ. F. BUTLER, D'f't.

In the above action I appear for the defendant.

F. L. WASHBURN.

On the twenty-third day of said November, 1886, the defendant filed his answer as follows, to wit:

SUFFOLK, *ss:*

Superior Court.

CHARLES P. GORELY, Assignee,
vs.
BENJAMIN F. BUTLER.

Defendant's Answer.

And now comes the defendant in the above-entitled action, and for answer denies each and every allegation and averment in the plaintiff's writ and declaration contained.

By his attorney, FRANK L. WASHBURN.

Also on said twenty-third day of November, 1886, the defendant filed his claim of jury trial.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

Superior Court, —— Term, 188–.

GORELY, Assignee,
v.
BENJ. F. BUTLER.

And now come- the defendant in the above-entitled action
10 and gives notice that he desires a trial by jury in said action.

By his attorney, FRANK L. WASHBURN.
(Per G.)

Thence the action was continued from sitting to sitting to the July sitting, 1887, when, on the twenty-sixth day of August, in said year 1887, the parties filed an agreement to waive jury trial, viz:

SUFFOLK, *ss:*

Superior Court.

AUGUST, 1887.

CHARLES P. GORELY, Ass-g-ee,
v.
BENJ. F. BUTLER.

In the above-entitled case trial by jury is waived and said action may be marked for the court.

W. H. H. ANDREWS, *For Pl'f.*
FRANK L. WASHBURN, *For D'f't.*

Also on said twenty-sixth day of August, 1887, the parties filed the following agreed facts, viz:

11 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss*:

Superior Court.

JUNE, 1887.

CHARLES P. GORELEY, Assignee,
vs.
BENJAMIN F. BUTLER.

In this case the facts are agreed as follows:

Isaac H. Taylor, of Boston, in said county, mentioned in the declaration, filed his voluntary petition in insolvency in said county June 20, 1883, on which he was duly adjudged an insolvent debtor, and his assignee was appointed on the 20th day of July in the same year, and his deed of assignment was thereupon issued to him on the same day, a copy of which is annexed and made a part hereof and is marked "A," and the plaintiff accepted the same, proceeded to the discharge of his duties, and published due notice of his appointment in the Boston Post in Sept., 1883, a newspaper published at Boston, Mass.

The second and third meetings of the creditors were duly held and due notice thereof published in newspapers at said Boston, at which claims were proved, but no discharge was granted to the insolvent. The schedule of assets of said Taylor did not disclose the claim hereinafter mentioned. Prior to said insolvency said Isaac H. Taylor, on or about the 14th day of June, 1863, in or near latitude 23 degrees south, longitude 43 degrees west, was a passenger on board the bark Good Hope, which was captured and burned by a tender of the Confederate cruiser Alabama named the Georgia; and said Isaac H. Taylor, being a passenger lawfully on board said bark Good Hope, an American vessel, by reason of said capture and burning of said bark, became the loser of his personal
12 effects, expenses, and other losses, amounting in all, as he claimed, to five thousand three hundred and fifty dollars, with interest thereon.

Whereupon after Congress had passed an act known as an act in regard to Alabama claims, by which citizens of the United States proving their losses should be indemnified out of the Treasury of the United States from the proceeds of the money paid to the United States by Great Britain under the Geneva award appointed under the treaty of Washington, which was then in the Treasury of the United States, said Taylor filed his claim on the 13th day of January, 1883, which claim was duly prosecuted and heard and was adjudicated in favor of Isaac H. Taylor by the Court Commissioners of Alabama Claims in the sum of three thousand seven hundred and eighty-five dollars and twenty-five cents, actual loss and damage sustained by him, with interest thereon, at the rate of four per cent. per annum, from June 14, 1863, to March 31, 1877, which interest amounted to the sum of two thousand and eighty-eight dollars and ninety-one cents, making a total sum adjudicated to him of five thousand eight hundred and seventy-four dollars and

fifteen cents. No other assets of value have come to the hands of the plaintiff as assignee aforesaid.

That on the 20th of February, 1885, a draft issued from the Treasury, a copy whereof, with the endorsements thereon, is hereto annexed and made a part hereof and is marked "B," payable to the order of Isaac H. Taylor for said sum, and was thereupon duly mailed to the care of Benjamin F. Butler, the defendant; E. J. Hadley and E. L. Barney, attorneys of record, at 16 Pemberton square,
Boston, which was received by them in due course of mail.
13 On February 24, 1885, Isaac H. Taylor died at said Boston intestate. On March 31, 1885, Sallie B. Taylor, of Duxbury, Massachusetts, the widow of said Isaac H. Taylor, upon her petition filed March 7, 1885, and on giving bond with sureties, was duly appointed by the probate court of the District of Columbia administratrix of the personal estate of said Isaac H. Taylor. There has been no appraisal nor has she as administratrix filed any inventory nor done any act so far as the records show since the letters of administration issued to her.

That on April 4, 1885, said Sallie B. Taylor executed a power of attorney, a copy of which is annexed and made a part hereof and is marked "C," to said Butler, the defendant, to endorse said draft and receive payment thereon from the Treasury of the United States, and thereupon said Butler received said sum of five thousand eight hundred and seventy-four dollars and fifteen cents; that said Butler thereafterwards paid, before the commencement of this suit, the attorney's fees upon said draft, amounting to $1,087, and on the 26th day of July, 1886, he paid the sum of one hundred and twenty-six dollars for undertaker's services, but without the knowledge of the plaintiff.

It is further agreed that the acts passed June 23, 1874, and June 5, 1882, made provision for the payment of losses suffered through certain cruisers called the inculpated cruisers, among which were the Alabama and her tenders, of which said Georgia was one.

That when said Sallie B. Taylor, the widow, applied to said Butler to have said money paid to her he advised her that that could
not be done unless she took out administration — in the Dis-
14 trict of Columbia, and she accompanied him to Washington, and there applied to the court for such letters of administration, and said Butler, the defendant, signed her bond as such administratrix, she having no property in the District of Columbia, and made an agreement with her to retain the draft and the moneys received thereon as security for his becoming surety on said bond. Owing to the claim made in this suit said administration has not yet been settled and concluded in said District, but awaits the determination thereof.

That demand was made upon the defendant for said draft by the plaintiff in person, at Boston, before the filing of said petition for administration by said Sallie B. Taylor, and defendant was at the same time notified by the plaintiff that he was assignee, as aforesaid, of the estate of said Taylor, and that as such assignee he was entitled to the amount of said draft and the proceeds thereon. The

treaty of Washington, the award of the arbitrators thereunder, and the acts of Congress of June 23, 1874, and June 5, 1882, the laws of Maryland as continued in force by the laws of the District of Columbia, and the laws of the District of Columbia, may be referred to and are made a part hereof.

If the court find that the plaintiff is entitled to recover, judgment shall be entered for the plaintiff for the sum of forty-six hundred and sixty-one and $\frac{15}{100}$ dollars, and interest thereon from June 1st, 1887; otherwise plaintiff to become nonsuit.

BENJ. F. BUTLER, *Pro Se.*
W. H. H. ANDREWS,
Att'y for Pl'ff.

Nov. 15, 1887.—Judgment for the plaintiff, $4,789.33.
Defendant appeals.

15 "B & C."

UNITED STATES OF AMERICA:

TREASURY DEPARTMENT, *June 1st*, 1887.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed are true copies of papers now on file ——, in this department.

In witness whereof I have hereunto set my hand and caused the seal of the Treasury Department to be affixed on the day and year first above written.

C. S. FAIRCHILD,
Secretary of the Treasury.

[SEAL.]

"B."

Diplomatic Warrant No. 670.

Draft on No. B 17600.

TREASURY OF THE UNITED STATES,
WASHINGTON, D. C., *Feb'y* 20, 1885.

Pay to the order of Isaac H. Taylor five thousand eight hundred & seventy-four $\frac{15}{100}$ dollars.

A. U. WYMAN,
Treasurer of the United States.

Registered Feb. 20, 1885.
W. P. TITCOMB,
Act'g Register of the Treasury.

(Paid Apr. 6, 1885, by Treasurer U. S.)

To Ass't Treasurer U. S., Boston, Mass.

[SEAL.]

$5,874.15.

16 Endorsed on back: Sallie B. Taylor, adm'x of Isaac H. Taylor, by her attorney-in-fact, Benj. F. Butler. Payable to Benj. F. Butler, attorney. Authority on file, J. R. Garrison, dep'ty first comptroller. Boston check, # 18843. 6830 a | 51.

Form 1782.

Power of Attorney to Collect Money Due on Draft to an Individual.

Know all men by these presents that I, Sallie B. Taylor, of Duxbury, of the county of Plymouth and State of Massachusetts, do hereby make, constitute, and appoint Benj. F. Butler, of Lowell, Massachusetts, my true and lawful attorney for me and in my place and stead to indorse my name on United States Treasury draft No. B 17600, dated Feb'y 20, 1885, for five thousand eight hundred and seventy-four $\frac{15}{100}$ dollars, issued on diplomatic warrant No. 670, and to receive and receipt for the money, giving my said attorney full power to do everything whatsoever necessary under the statute or executive regulation as fully as I could do if personally present, hereby ratifying and confirming all that may be done by my said attorney by virtue hereof.

In witness whereof I have hereunto set my hand the fourth day of April, 1885.

SALLIE B. TAYLOR. [SEAL.]

17 (Two witnesses.)
Signed in the presence of—
PAUL WEST.
THOMAS V. CONNERS.

STATE OF MASSACHUSETTS, } *ss:*
County of Suffolk, }

[SEAL.]

Be it known that on the fourth day of April, 1885, before me, Arthur P. French, a notary public, personally appeared Sallie B. Taylor, to me personally well known to be the identical person named in the foregoing power of attorney, who in my presence subscribed and acknowledged the said power of attorney to be his act and deed; and I do hereby certify that the said power of attorney was read and fully explained to the said Sallie B. Taylor at the time of acknowledgement.

In testimony whereof I have hereunto set my hand and affixed my notarial seal the day and year aforesaid.

ARTHUR P. FRENCH,
Notary Public.

18 To be acknowledged before an officer having authority to take acknowledgement of deeds.

If executed in a foreign country the acknowledgement must be made before a notary public, with his seal attached, or a U. S. consul or minister.

This instrument must be signed in the presence of two persons, who must sign their names as witnesses.

The residence of both parties must be distinctly stated.

The indorsement by the attorney: Name of payee, —— ——, by —— ——, attorney-in-fact. 6830 a | 51. [Notarial seal.] J. R. G.

19 Thence the same was continued to the October sitting, 1887, when, on the fifteenth day of November, in said year 1887, said agreed statement of facts being presented to the court and seen and understood, judgment was ordered thereon for the plaintiff in the sum of four thousand seven hundred eighty-nine dollars and thirty-three cents; from which said order and ruling the said defendant appealed to the supreme judicial court for the Commonwealth.

Thence the action was continued to await the decision upon said appeal to the January sitting, 1888, and thence to the present April sitting, 1888.

And now, on the fourth day of May, in said year 1888, the supreme judicial court for the Commonwealth transmitted to said superior court the following rescript, to wit:

COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, May —, 1888.

In the case of Charles P. Goreley, assignee, *vs.* Benjamin F. Butler, pending in the superior court for the county of Suffolk,
20 ordered that the clerk of said court, in said county, make the following entry under said case in the docket of said court, viz:

Judgment for plaintiff for ($4,661.15) four thousand six hundred and sixty-one dollars and fifteen cents and interest thereon from June 1, 1887.

By the court:

HENRY A. CLAPP, *Clerk.*

May 4, 1888.

It is therefore considered by the court, on the fourth day of June, 1888, that said Charles P. Goreley, as assignee as aforesaid, recover of said Benjamin F. Butler, defendant as aforesaid, the sum of four thousand nine hundred forty-three dollars and fourteen cents, damages, and costs of suit, taxed at thirty-four dollars and forty-one cents.

All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said superior court to be hereto affixed.

21 Witness Lincoln Flagg Brigham, Esquire, chief justice of our said superior court, at Boston, in said county of Suffolk,

this third day of October, in the year of our Lord one thousand eight hundred and eighty-eight.

[Seal of the Superior Court.]

JOS. A. WILLARD, *Clerk.*

22 Know all men by these presents that we, Benjamin F. Butler, of Lowell, in the county of Middlesex and Commonwealth of Massachusetts, as principal, and Prentiss Webster, of said Lowell, are held and firmly bound unto Charles P. Goreley, of Boston, in the county of Suffolk and said Commonwealth, as assignee of the insolvent estate of Isaac H. Taylor, late of said Boston, in the full and just sum of eight thousand ($8,000) dollars, to be paid to the said Charles P. Goreley, assignee as aforesaid, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the nineteenth day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, at the April sitting of the superior court in and for said county of Suffolk, to wit, on the first Monday of June, A. D. 1888, in a suit depending in said court between said Charles P. Goreley, assignee, as plaintiff, and said Benjamin F. Butler, as defendant, judgment was rendered against the said Benjamin F. Butler, and the said Benjamin F. Butler having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Charles P. Goreley, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Benjamin F. Butler shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

BENJ. F. BUTLER. [L. S.]
PRENTISS WEBSTER. [L. S.]

Signed, sealed, and delivered in presence of—
FRANK L. WASHBURN.

Approved Sept. 29, 1888.

LINCOLN F. BRIGHAM,
Chief Justice of the Superior Court.

A true copy of the bond on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest:

JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

23 *Citation.*

The United States of America to Charles P. Goreley, assignee, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the superior court of the Commonwealth of Massachusetts within and for the county of Suffolk, wherein Benjamin F. Butler is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lincoln F. Brigham, chief justice of said superior court, this thirtieth day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

LINCOLN F. BRIGHAM,
Chief Justice of Superior Court.

Due and sufficient service of this citation is acknowledged.

W. H. H. ANDREWS,
Attorney for Plaintiff.

24 The Supreme Court of the United States.

BENJAMIN F. BUTLER, Plaintiff in Error,
vs.
CHARLES P. GORELEY, Assignee, Defendant in Error. } No. —.

Assignment of Errors by Plaintiff in Error.

And now comes said Benjamin F. Butler, plaintiff in error, and assigns the following as errors in the trial of said cause before the State court of Massachusetts:

I. That the State court, against the contention of the defendant, held and declared that the laws of insolvency of the State could and did affect, assign, and transfer the claim of Isaac H. Taylor against the United States, being in the form of an adjudication of the Court of Alabama Claims, as against his widow, his administratrix in the District of Columbia.

II. That the State court decided, against the contention of the defendant, that the insolvent law of Massachusetts transferred the property of said Isaac H. Taylor, to wit, a claim against the United States, evidenced by an award of the Court of Commissioners of Alabama Claims.

III. That the State court decided, against the contention of the defendant, that the insolvent laws of Massachusetts as enforced took effect upon the person and property of said Isaac H. Taylor
25 as a system of bankruptcy in contravention of the Constitution and laws of the United States.

BENJ. F. BUTLER.

26 [Endorsed:] Supreme Court of the United States. Benj. F. Butler, pl'ff in error, *vs.* Chas. P. Goreley, assignee, def't in error. Assignment of errors by pl'f in error. May be filed without assent to form or substance. W. H. H. Andrews, att'y for def't in error.

[Endorsed:] Supreme Court U. S. 1889, October term. No. 960. Benj. F. Butler, pl'ff in error, *vs.* Chas. P. Goreley, assignee. Assignment of errors.

[Stamped:] Office Supreme Court U. S. Filed May 23, 1889. James H. McKenney, clerk.

Endorsed on cover: Massachusetts superior court. No. 252. Benjamin F. Butler, plaintiff in error, *vs.* Charles P. Goreley, assignee of Isaac H. Taylor. Filed October 15, 1888.

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AGREED DIMINUTION OF RECORD.

AGREEMENT TO AMEND RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 252.

BENJAMIN F. BUTLER, PLAINTIFF IN ERROR,

v.

CHARLES P. GORELEY, ASSIGNEE OF ISAAC H. TAYLOR.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

In this case it appearing that there is a diminution of the record by the omission of the copy of the deed of assignment in insolvency issued to the defendant in error as assignee of the estate of Isaac H. Taylor, and the further omission of the opinion of the Supreme Judicial Court of Massachusetts in said case as reported in the 147th Massachusetts Reports, page 8, it is agreed between the parties that the same may be clearly printed uniform with the copy of the record, and attached thereto, to be used by the Court to the same effect as if the several papers had been sent up with the copy of the record attached to the writ of error.

BENJ. F. BUTLER,
pro se.

CHAS. LEVI WOODBURY,
For Defendant in Error.

EXHIBIT "A."

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

COURT OF INSOLVENCY.

[SEAL.]

IN THE CASE OF

ISAAC H. TAYLOR,

OF BOSTON IN SAID COUNTY,

Insolvent Debtor.

Know all Men by these Presents: That, Whereas, Charles P. Goreley, of said Boston, has been duly appointed Assignee in said case;

Now, therefore, I, John W. McKim, Esquire, Judge of the said Court of Insolvency, by virtue of the authority vested in me by the laws of said Commonwealth, do hereby convey and assign to the said Assignee all the estate, real and personal, of the said Isaac H. Taylor, Insolvent Debtor, including all the property of which he was possessed, or which he was interested in or entitled to on the twentieth day of June in the year one thousand eight hundred and eighty-three, excepting such as may be by law exempted from attachment, with all his deeds, books, and papers relating thereto.

To have and to hold all the above-granted premises to the said Charles P. Goreley and his heirs, forever; *In trust, nevertheless,* for the uses and purposes, with the powers and subject to the conditions and limitations set forth in the laws aforesaid.

In Witness Whereof, I, the said Judge, have hereunto set my hand and caused the seal of said Court to be affixed, on this twentieth day of July, in the year one thousand eight hundred and eighty-three.

JOHN W. McKIM,
Judge of the Court of Insolvency.

Copy of record.
Attest:
[SEAL.]

JOHN H. PAINE,
Assistant Registrar.

Opinion of the Supreme Court of State.

Holmes, J. So far as appears, the claim of the insolvent for losses by a tender of the "Alabama" was within the Act of Congress of June 23, 1874, and therefore probably this case is governed by Leonard *v.* Nye, 125 Mass. 455; Jones *v.* Dexter, 125 Mass. 469, 471. But it is necessary to stop at this point, because, whatever the original matter of the claim, the Act of June 5, 1882, had been passed, and proceedings under it had been begun by the insolvent before the dates when he filed his petition in insolvency and the plaintiff was made his assignee.

The Insolvent Act provides that "the assignment shall vest in the assignee all the property of the debtor, real and personal," etc. See Pub. Sts., c. 157, § 146. When the sovereign power has established a claim against itself, or against a fund in its hands, and has provided a tribunal and all necessary machinery for its establishment and collection, such a claim is "property" within the meaning of the act.

If the claim is established in pursuance of what would have been an antecedent legal duty on the part of the sovereign, but for its sovereignty, the proposition which we lay down follows a portion from decisions like Leonard *v.* Nye, Jones *v.* Dexter, *ubi supra*, and Comegys *v.* Vasse, 1 Pet. 173; that some claims against the sovereign will pass in bankruptcy or insolvency, although the act which recognizes and makes them effectual is not passed until after the assignment. These cases dispose of any general objection that claims against the sovereign cannot be legal rights in a strict judicial sense. Such claims are given also the incidents of property by law, although since the continued recognition of them until they can be proved, and the final payment of them depend upon the will of the sovereign; that is, upon the law remaining unchanged, as is the usual case of claims against subjects, such recognition and payment in this case depend upon the honor of the *quasi* debtor or trustee, and not upon a sovereign power, stranger to the undertaking.

The English Courts, although they have hardly gone so far as the Courts of this country, have treated as property within the

English Bankrupt Act a pension granted on the retirement of a public officer (possibly in pursuance of some sort of understanding at the time of his taking office) which depended for its payment on an annual vote of a colonial legislature. *Ex parte* Huggins, 21 Ch. D. 85. In this case, it is suggested, and we agree, that it could not be doubted that bonds of a foreign or of the home government would be property.

If now the claim which the statute establishes, instead of being based upon some sort of consideration, is granted as a pure gratuity, as in Heard *v.* Sturgis, 146 Mass. 545, still, when granted, it is just as absolute a claim; it is to the same extent and in the same sense a legal claim, and it has the same security for being paid, as the other. It depends upon the will of the sovereign no more than the other. It is not like the case of an allowance depending for its continuance on the will of a private individual who prays it, as in *In re* Wicks, 17 Ch. D. 70, or upon the discretion of a subordinate public officer, as in *Ex parte* Webber, 18, Q. B. D. 111.

It was argued that, by force of the U. S. Rev. Sts. 3477, this claim could not be assigned in insolvency before it was allowed. Assuming that that section applies to claims like the present (Stevens *v.* United States, Feb. 26, 1883, in Rules, Opinions, etc., of Court of Commissioner of Alabama, Claims, Washington, of 1885), it does not apply to assignments in bankruptcy, although upon a voluntary petition (Erwin *v.* United States, 97 U. S. 392), and by parity of reasoning, it does not apply to assignments in insolvency. If it should be suggested that, although property of the insolvent, it was not property "which he could have lawfully assumed" in person, and therefore, was not within the words of the State Insolvent Act, the answer is, that it is clearly within the general intent of the Public Statutes, c. 157, §§ 44–46, and that it is clearly within the specific words, "right of action for goods or estate, real or personal." Jones *v.* Dexter, *ubi supra*.

It was suggested that we should reconsider the question of the constitutionality of the State Insolvent Law, on the ground of a recent decision of the Supreme Court of the United States upon the clause of the Constitution touching the regulation of commerce.

Wabash, St. Louis & Pacific Ry. Company *v.* Illinois, 118 U. S. 557. We discover no indication in that case that the majority intended to disturb the decision in Ogden *v.* Saunders, 12 Wheat. 213, and the cases which have followed it. If what has been understood for sixty years to be the law, and what the Supreme Court of the United States has pronounced "settled and forever closed," is to be overthrown, it must be done elsewhere than in this court. Baldwin *v.* Hale, 1 Wall. 223, 228; Boyle *v.* Zacharie, 6 Pet. 348; S.C. 6 Pet. 635, 643; Blanchard *v.* Russell, 13 Mass. 1, 16; Day *v.* Bardwell, 97 Mass. 246, 250; Barton *v.* White, 144 Mass. 281.

Finally, it was argued that this action could not be maintained against the present defendant. We see no ground for doubt. The plaintiff had no notice of the proceedings instituted by his insolvent until the latter had got his judgment and a draft for the amount was in the defendant's hands. Then the plaintiff demanded the draft, and was entitled to receive it. Quimby *v.* Carr, 7 Allen, 417; Cook *v.* Holbrook, 6 Allen, 572, 573; Cox *v.* Prentice, M. & S. 344. The fact that the defendant subsequently advised the widow of the insolvent to take out administration in Washington, that she did so, and that he signed her bond, with an agreement that he should retain the draft as security, cannot better his case. It is asked why, if the claim of the insolvent passed to the plaintiff, he cannot recover against the United States, notwithstanding a payment by them to the wrong person? The answer is, that it is settled that the effect of the judgment of the Court was to appropriate a fund to the claim, and to transfer the claim to that fund, leaving the question of title open to subsequent litigation in the ordinary courts. The statute does not leave the United States subject to be charged a second time, any more than on the other hand it makes the decision of the Court of Commissioners of Alabama Claims conclusive as to the person entitled to its bounty.

Judgment for plaintiff.

146 U.S. 303

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CLERK.

Supreme Court of the United States.

October Term, 1891.

BENJAMIN F. BUTLER,

Plaintiff in Error,

v.

CHARLES F. GORELEY, ASSIGNEE OF ISAAC H. TAYLOR,

Defendant in Error.

Plaintiff's Brief of Argument.

Supreme Court of the United States.

OCTOBER TERM, 1891.

BENJAMIN F. BUTLER, PLAINTIFF IN ERROR,

v.

CHARLES P. GORELEY, ASSIGNEE OF ISAAC H. TAYLOR, DEFENDANT IN ERROR.

PLAINTIFF'S BRIEF OF ARGUMENT.

STATEMENT OF CASE.

This is a writ of error to reverse the decision and judgment in favor of the defendant in error of the Superior Court of the Commonwealth of Massachusetts, said court being the highest court in said State in which said decision and judgment could be had and was rendered.

The facts and contentions of the parties are as follows:

Isaac H. Taylor, of Boston, made his voluntary petition in insolvency in Boston, County of Suffolk,

on the 20th day of June, 1883, and his assignee was appointed, and the judge made his deed of assignment on the 20th day of July, 1883, a copy of which marked "A" is annexed and made a part of the agreed facts; and the defendant in error accepted the same and proceeded in the discharge of his duties.

The schedule of assets of said Taylor required by law, which was duly filed by him, did not disclose the claim hereinafter mentioned.

Taylor, on the 14th day of June, 1863, in latitude twenty-three degrees south and longitude forty-three degrees west, was a passenger on board the bark "Good Hope," which was captured and burned by a tender of the Confederate cruiser "Alabama," named the "Georgia"; and Taylor being a passenger lawfully on board said bark, an American vessel, by reason of the capture and imprisonment on board the "Georgia" and the burning of said bark, lost his personal effects, and thus suffered damage amounting in all, as he claimed, to $56,350 with interest thereon, for which he filed his claim on the 14th day of January, 1883, and had an award in his favor by the 2d Court of Commissioners of Alabama Claims in the sum of $3,785.25, actual loss and damage sustained by him, with interest thereon, which interest amounted to the sum of $2,088.91, making a total sum adjudicated to him of $5,874.16 in January, 1885.

No assets of value have come to his assignee, the defendant in error.

On the 20th of February, 1885, a draft from the Treasury, payable to Taylor's order, for said sum issued, and was mailed to the care of the plaintiff in error, E. J. Hadley and E. L. Barney, attorneys of record, at Boston, and was received by them in due course of mail on the 24th of the same February.

Taylor died February 24, 1885, in New York. On March 31, 1885, Sally B. Taylor, of Duxbury, Massachusetts, his widow, upon her petition filed March 7, 1885, on giving bond with sureties, was duly appointed by the Probate Court of the District of Columbia administratrix of the personal estate of said Isaac H. Taylor.

April 4, 1885, Sally B. Taylor executed a power of attorney to the plaintiff in error, a copy of which is annexed and made a part of the agreed facts, marked "C," to indorse said draft and receive a payment thereof from the Treasury of the United States; and afterwards said Butler received said check of $5,874.16.

Sally B. Taylor, the widow, applied to said Butler to have said money paid to her. He advised her that that could not be done unless she took out administration in the District of Columbia; and she accompanied him to Washington and there applied to the Court for such letters of administration; and plaintiff in error signed her bond as such administratrix — she having no property in the District of Columbia — upon an agreement with her that he retain the draft and the money received thereon as security for his becoming surety on said bond. Owing

to the claim made in this suit, said administration has not yet been settled and concluded in said District, but awaits the determination thereof. Demand was made upon the plaintiff in error for said draft by the defendant in error in person at Boston before the filing of said petition for administration by said Sally B. Taylor, and the plaintiff in error was at the same time notified by the defendant in error that he was assignee of said Taylor, and that as such assignee he was entitled to said draft and the proceeds thereof. It is because of some expenditures agreed upon that if the defendant in error is entitled to judgment it shall be rendered for the sum of $4,661.15, and interest thereon from June 1, 1887. Otherwise the defendant in error to become non-suit.

Thereafter the suit was brought in the Superior Court of Massachusetts, in which, on the 15th day of November, said agreed facts being presented to the Court, and seen and understood, judgment was ordered thereon for the plaintiff, from which said order and ruling the defendant appealed to the Supreme Judicial Court of said Commonwealth. The case being heard in that court the 4th day of May the Supreme Judicial Court transmitted to said Superior Court a rescript directing the judgment that should be entered by the Superior Court in said cause.

Said cause was argued before the Supreme Judicial Court by both parties, and upon the hearing it

was claimed by the plaintiff in error that the Court should hold in his favor, amongst other things, the propositions of law set forth in the assignment of errors, as follow:

ASSIGNMENT OF ERRORS.

I. That the State court, against the contention of the defendant, held and declared that the laws of insolvency of the State could and did affect, assign, and transfer the claim of Isaac H. Taylor against the United States, being in the form of an adjudication of the Court of Alabama Claims, as against his widow, his administratrix in the District of Columbia.

II. That the State court decided, against the contention of the defendant, that the insolvent law of Massachusetts transferred as the property of said Isaac H. Taylor, to wit, a claim against the United States, evidenced by the award of the Court of Commissioners of Alabama Claims.

III. That the State court decided, against the contention of the defendant, that the insolvent laws of Massachusetts as enforced took effect upon the person and property of said Isaac H. Taylor as a system of bankruptcy in contravention of the Constitution and laws of the United States.

The first fact to be considered is, What was the character and situation of this claim of Taylor's, January 13, 1883, when he filed his last petition in the Court of Alabama Claims? It was simply, as the

facts show, that he had lost his personal effects by the burning of the bark whereon he was a passenger, by the Georgia, one of the exculpated Confederate cruisers, and the imprisonment of his person by the same cruiser. Or, as it is expressed in the agreed statement, he lost his personal effects by reason of the capture and burning of the said bark, and expenses and other losses by reason of his capture and imprisonment, to the amount of, as he claimed, $56,350. The Commission awarded him $3,785.25 with interest, on account of his said claims.

It will be seen that his claim is for indemnity for loss in two forms:

First, the destruction of his personal effects off Cape Good Hope; and, *second*, for false imprisonment at the same place in 1863. That is to say, one claim is for loss of destroyed personal effects, and the other for damages for false imprisonment.

It does not appear what amount was given by the award for each class of losses.

Claims for damages to persons or destruction of goods, not liquidated or adjudicated, are unassignable.

Choses in action are unassignable at common law.

Gillis' Case, 95 U. S. 405.
Coolidge *v.* Ruggles, 15 Mass. 198.
Gardner *v.* Adway, 12 Wend. 297.

Actions *de bonis asportatis* are assignable, because, being remedies for property, they survived by Stat. Edw. III., ch. 7.

North *v.* Turner, 9 S. & R. 244.

In that case this distinction is drawn between personal torts and conversion of existing property.

Leaving out for the moment the many intermediate steps through which we must follow before we reach the Government, let us assume that the destruction of the property now subject to claim was done by the United States directly; would such unliquidated claim be assignable?

We suppose the law to be, clearly not; and why not? Because such claim has in it no element of existing property or contract.

It does not survive to the administrator so as to go by the law through death as property, which is the most sweeping of all assignments.

We agree that the common law has been changed, so that equitable rights under contracts as to property, *choses in action*, can be assigned, and such interests the law will protect, which may be transferred through bankruptcy proceeding, or descend to the administrator, and are duly acknowledged as property; but the change in the law has gone no farther. It deals with disputed rights only. This assignability does not attach to a claim as a *chose*, for a property not in existence or in contract, which the party claiming, being thus out of possession, sets up a right which is unacknowledged or unadjudicated.

So are the authorities.

That the *chose* must be a property right was settled in the very celebrated case, much quoted both in this country and in England, of Comegys *v.* Vasse, 1 Pet. 212.

In that case an underwriter to whom had been abandoned claims to vessels captured by Spain, and all rights to said vessels, and to all claims there might arise against Spain or the United States in case she assumed the losses of those vessels, had gone into bankruptcy. Mr. Justice Story decided that such *choses in action* would pass by assignment, being *jus ad rem* or *jus in re*, a possibility coupled with an interest, and passed by proceedings in bankruptcy, devise, or inheritance.

The ships in that case which had been abandoned to the underwriters had not been destroyed, but only illegally adjudged by a Spanish prize court. Milnor *v.* Metz, 16 Pet. 221.

Therefore there was a possibility of *jus in re* in the injured American citizen for injury done by Spain, which by treaty the United States undertook to make good to her citizens individually, as a part of the consideration for the concession of Florida to the United States; that is to say, the United States agreed to pay all valid claims against Spain made by her citizens, and established a commission by treaty to ascertain their validity and amount.

See treaty with Spain dated February 22, 1819, Arts. 9 and 11, 8 Stat. at Large, pp. 258, 260.

The language of the treaty would seem broad enough to cover claims against Spain for personal wrongs and injuries, though these are expressly decided in Comegys *v.* Vasse not to be assignable.

Mr. Justice Story says:

"In general, it may be affirmed that mere per-

sonal torts which die with the party and do not survive to his personal representative, are not capable of passing by assignment."

As we have seen, injuries to personal or real property do not pass by assignment or in bankruptcy.

Shoemaker *v.* Kealy, 2 Dall. 213.
O'Donald *v.* Seybert, 13 Serg. & R. 54.
Dunsar *v.* Murgatroyd, 1 Wash. C. C. 13.
Krumbhaar *v.* Burt, 2 Wash. C. C. 406.

That a claim to be assigned by operation of law must be a right in property, assumed to be existing, out of possession of claimant (*i. e.*, a *chose in action*), has been, both in this country and in England, maintained by an unbroken chain of authorities, and is affirmed here in a very late case, Erwin *v.* United States, 97 U. S. 392.

This was a claim to cotton captured in the late war, sold by the United States, and the money placed in the Treasury. Afterwards Erwin, bankrupt, sued for it. Defence was that claim passed to his assignee, quoting Comegys *v.* Vasse. Mr. Justice Field says, "Vested rights *ad rem* and *in re*, in possibilities coupled with an interest, and claims growing out of, and adhering to property, will pass" by bankruptcy.

But the bankrupt law of 1800 required in addition to the deed of the commissioner, which passed all "claims at law and equity," that he make a deed of all his claims of assumed incorporeal rights, to pass them.

The turning point in Comegys *v.* Vasse was that the United States had assumed to pay to the underwriters for the vessels which had been seized by Spain, and by treaty had assumed the place of Spain to pay for or make good all these torts which are only trespasses *de bonis asportatis* which, as we have seen, survive to the administrator.

The claim at bar stands on wholly different grounds from those under the Spanish treaty. It is a pure "donation" by the Government of its own money to a party who had no shadow of vested right to it.

After the Treaty of Washington had erected the Geneva tribunal, and it had met, and our case had been served on the British agent, he found it to contain two classes of "national claims:" first, claims for indirect losses, including prolongation of the war; the enhancement of costs of commerce; and the costs of pursuit by United States ships of war of the rebel cruisers protected by Great Britain.

The second class was losses of corporations and individuals by the operations of the rebel cruisers, and losses paid by underwriters.

Whereupon Great Britain refused to proceed with the arbitration unless the first class of claims of the United States were withdrawn. After negotiation it was agreed to submit to the arbitrators whether the first class of national claims of the United States

ought to be considered; which question was decided that they ought not to be, and were not.

Whereupon the case proceeded, the United States consenting to go on the other class of its "national claims." The question then arose in the State Department as to the manner in which these losses should be presented, whether as national or as individual losses, or whether the tribunal should determine in any degree whatever what disposal the Government should make of the money awarded to it.

To prevent all possible mistakes the Secretary of State forwarded both to the agent of the United States and its Counsel separately a letter of instruction, a part of which is as follows:

"DEPARTMENT OF STATE,
"WASHINGTON, Dec. 8, 1871.

"GENTLEMEN: In the discussion of this question and in treatment of the entire case, you will be careful not to commit the Government as to the disposition of what may be awarded or what may be recovered in the event of the appointment of the Board of Assessors mentioned in the tenth article of the treaty. . . ."

In obedience to these instructions, on June 10, 1872, the claims of the United States were presented in the argument, in these words:

"That these claims are all preferred by the United States as a nation against Great Britain as a nation, and are to be so computed and paid, whether

awarded as a sum in gross under the seventh article of the treaty, or awarded for assessments for amounts under the tenth article." Papers relative to the Treaty of Washington, Vol. 3, p. 16.

The tribunal found our "national losses" in a gross sum.

"The tribunal at length announced that a result had been reached that fifteen and a half millions of dollars would be as a gross sum to be paid by Great Britain to the United States.

"It does not appear in the protocols how the arbitrators arrived at this amount. I am informed that it was reached by mutual concessions." Report of agent of the United States, Vol. 4, p. 16.

The recommendation of the President to Congress concerning the money paid for these "national losses" was referred to the House Committee of the Judiciary, and considered by them in the third session of the Forty-second Congress. The committee in their report thus state the principle on which they predicate the distribution of this fund:

"From these and other considerations which might be presented, your committee have come to the conclusion that the amount awarded at Geneva is the money of the United States, to be disposed of at its pleasure, subject to no trusts, and especially no legal rights, in any individual or corporation by whom a legal or equitable claim can be set up or maintained to any part of the sum awarded, as against the United States." Congres. Globe, Vol. 93, p. 1394.

A bill was reported which passed the House — yeas, 122; nays, 56 — which provided for the distribution of the award according to the pleasure of Congress, rejecting all alleged legal claims.

The insurance companies made a claim that their rights should be recognized by Congress, because their claims came before the tribunal; but that claim was rejected, — yeas, 24; nays, 157. (*Ibid.*, p. 1399.)

By an Act approved March 3, 1873, ch. 261, it was provided that when the sum was paid by Great Britain the same "shall be paid into the treasury, and used to redeem, so far as it may, the public debt of the United States," and an equal amount "shall be invested in five per cent. bonds subject to the future disposition of Congress."

Congress has since, at its pleasure, given portions of the sum to reimburse war premiums; to pay losses occasioned by the cruisers for whose acts the tribunal held England not liable, but not to the underwriters, who claim rights because th vessels on which they paid losses have been abandoned to them by the policy holders, thus giving them assignments of the rights of the owners of the captured vessels.

Thus it will be seen that this fund has been from the first treated as "the money of the nation," and any disposition of it was not according to any supposed legal rights or equities, but a pure donation according to the Government's good-will and pleasure.

That no rights assignable, suable, or presumable accrued to the owner of destroyed property, because

the Government has exacted payment to itself for a wrong done by another nation, unless by provisions of the treaty the reclaiming government has promised to pay to its citizens the claims they have against the defaulting government and receive the money for that precise purpose, has been fully decided. Rustomjee, Pet'r, *v.* The Queen, 1 L. R. 487; s. c. 2 L. R. Q. B. D. 69.

In that case, by a treaty between the Queen and the Emperor of China, $3,000,000 were paid to the Queen by the Emperor on account of debts due to British subjects from Chinese merchants who had become insolvent. The petitioner, Rustomjee, was the owner of one of the debts covered by that payment; and during the negotiation of the treaty the British agents promised him that his claim should be inserted; and that the money when recovered should be paid him. It was not disputed that his debt was included in the sum so paid. Under the laws of England, whoever claims that the Crown has money of his in its possession, may bring suit therefor by petition of right. Rustomjee filed such a petition, claiming the Queen to be his agent and trustee.

Lord Chief Justice Cockburn (himself one of the arbitrators at Geneva) observed, in refusing the prayer of the petition:

"The notion that the Queen of this country, in receiving a sum of money in order to do justice to some of her subjects to whom injustice would other-

wise be done, becomes the agent of those subjects seems to me really too wild a notion to require a single word of observation beyond that of emphatically condemning it. In like manner, to say that the sovereign becomes the trustee for the subjects on whose behalf money has been received by the Crown, appears to be equally untenable. It comes simply to this, that Her Majesty, in order to enable her to see that injustice is not done to her subjects, stipulates for the payment into her hands of a sum of money. The distribution of that must be left to Her Majesty's discretion."

On appeal to the full court, Lord Coleridge, C.J., sustaining the ruling, said:

"We assent, upon full consideration, to the reasoning of the judges in the court below," etc.

In the case of Burnard *et al. v.* Rodocanach, 44 L. T. (N. S.) 538 (June 11, 1881), the second question was, Was the payment of their money to the defendant more than a free gift, a pure act of grace on the part of the United States? Lord Coleridge, C. J., says:

"If it were, I am of opinion that his action would clearly be not maintainable, and at first sight there is much to be said for the contention that it is a mere act of grace. The money out of which this is paid to the defendant is a sum of money paid by Great Britain to the United States, from one sovereign state to another; and Rustomjee's case is a distinct authority for holding that money paid by one

sovereign state to another in respect of war losses occasioned by the paying state to the subjects of the receiving state, gives no legal right whatever to a particular subject of the receiving state, compensation for whose loss has been paid to that state, capable of being enforced in any court against the sovereign or the government of that state."

Then Coleridge declared that there would be a moral equity which makes the Government, in respect to what it has so recovered, trustees for those who in equity and justice are entitled to it.

Quære, Is a moral equity assignable in bankruptcy?

An appeal was taken, and Bramwell, L. J., decided:

"I cannot (though I say so with greatest respect) think that the judgment of Lord Coleridge is right; and, although the Court is not unanimous, it seems to me that it would be useless to take time to consider our judgment, for what we have to decide is a short point, and there is no complication in the case. Lord Coleridge thought that there were only two points which it was necessary to consider, for he said in the course of his judgment, 'Two points arise: *First*, Is the value of the policies which have been paid absolutely conclusive in case of actual loss between the parties to the policies? And *secondly*, was the payment of this money to the defendants more than a free gift, a pure act of grace on the part of the United States?' Now, I venture to think that there is a *third* and more important point, which is this: Suppose this was a free gift, was it a gift

which could be called a portion of the salvage of the thing insured? I agree with the reasoning and the conclusion of Lord Coleridge on the other points; and, agreeing with this reasoning, I should have thought that if the money had been awarded because the cargo was taken by the 'Alabama' *simpliciter*, it would have been a portion of the salvage, and the present case would have been within the principle of the cases referred to and relied upon in his judgment. But there arises the third question, which was omitted in Lord Coleridge's judgment; namely, 'Was this given as salvage?' I am clearly of the opinion that it was not. In considering this question we must look at the Act of Congress. It says that no claim shall be allowed for any loss in respect of which compensation or indemnity has been received from insurers; but that if an owner insures by a valued policy for an amount which is under the real value of the property insured, he shall receive nothing for the policy, but for the under-insurance he shall receive an indemnity. I may use Mr. Hardy's argument as to this question. Suppose there were a subscription, or a grant of money, awarded for the purpose of encouraging people to insert moderate values in valued policies, and that a person received an indemnity for a loss from the sum so subscribed or awarded, it seems clear to me that this would not be salvage."

While this brief was being prepared, in Williams *v.* Heard, 140 U. S. R., p. 529, the Court decided in regard to the war premiums [which were brought to the notice of the tribunal at Geneva], that "these war premiums were recognized by the Government of the United States as a valid claim for which satis-

faction should be guaranteed. There was thus at all times a possibility that the Government would see that they were at some time paid. There was a possibility of their being at some time valuable; that they were not enforceable until after the passage of the Act of Congress for the distribution of the fund; but the Act of Congress did not create the rights; they had existed at all times since the loss occurred. In our opinion this case falls within the principles of Comegys *v.* Vasse and Phelps *v.* McDonald."

It will be remarked that in Williams *v.* Heard, the authorities that we have cited and the principle heretofore set fourth in our brief, were not adverted to.

Let us proceed to show the distinction between the claim of Taylor and Comegys *v.* Vasse and Phelps *v.* McDonald.

In Comegys *v.* Vasse the property sought to be recovered was in existence; the *res* was there. The right of property was only disturbed by a decree of a Spanish court which the treaty set aside. There was the *res*, and the right of the claimant was therefore a *jus ad rem* or a *jus in re.* And after that had been recognized by the Spanish Government, and the United States had undertaken to pay that class of claims, there was a possibility of interest that it might be paid. That is clearly recognized by Judge Story as the foundation of his opinion that it could pass to the assignee, for, as we have seen, he expressly declares, "In general it may be affirmed that mere personal torts which die with the party and do not

survive to his personal representative, are not capable of passing by assignment."

So in Phelps *v.* McDonald, 99 U. S. R., p. 298, the character of the *res* was not in controversy; but what were the equities between the parties, the *res* being in existence, to wit, money in the hands of a British agent?

And so in Erwin's case, the money was in the United States Treasury to be paid to the owner.

In each case there was a *res* in fact existing, or in *contract* with the Government.

But what is the present case?

Taylor, in 1863, had been imprisoned and had his personal effects destroyed by the Confederate cruiser "Georgia" on the high seas. The "Georgia" was an exculpated cruiser, even if a tender of the "Alabama." [See his testimony before the second Court of Alabama Claims and the decision of the first Court on his first petition. Appendix, pp. 52–53.] The Geneva tribunal found that the acts of the "Georgia" did not contribute to the national losses for which England was liable to the United States.

By the Act of June 23, 1874, there was committed to the adjudication of the Court of Alabama Claims the direct losses to American citizens by the acts of the "Alabama" and "Florida" and their tenders.

Taylor filed his petition before the first Commission for this injury by the "Georgia," and his petition was dismissed because the "Georgia" was an exculpated cruiser, *i. e.*, a cruiser for the acts of which England was not liable, and paid nothing; and the provisions

of that Act, presupposing that there would not be money enough in the amount awarded to pay all those claims, directed that the amount might be apportioned among the adjudged claimants.

Meanwhile, as we have seen, and by the provisions of the Act, the money was all covered into the Treasury, and the Secretary was directed to sell United States five per cent. bonds to get the money to pay these judgments.

At that moment what possible claim, either in law or equity, or what moral obligation, was there in the United States to remunerate this loss? England had not been made liable for it; she was under no more obligation to pay this loss than any loss suffered by any citizen in the war, and we are certainly not under equitable or moral obligation to make good that class of losses. Nay, what *spes recuperandi* could exist of this loss, or that it would ever be paid, especially after he had applied for it to be paid, and the tribunal dismissed his petition on the ground of the exculpation of the "Georgia," which decree was acquiesced in by him?

By the Act, 22 U. S. Statutes at Large, ch. 196, Congress established a tribunal for the adjudication for certain class of losses suffered by American citizens during the war, and provided for their payment "out of any money in the treasury not otherwise appropriated." (Sect. 9.)

One of these classes was "claims directly resulting from damage done on the high seas by Confederate cruisers during the late Rebellion."

All that class of losses for which England was responsible had been adjudicated and paid, and Congress simply passed an Act to recompense from the Treasury losses occasioned by acts of other Confederate vessels, for which England was not responsible.

Was not this a mere donation?

How does it differ from an Act of Congress giving pensions to soldiers who received injuries during the war? It is well enough to pay pensions to the last, or to give money to the first; but where do we find the *jus in rem* or the *jus ad re* in either case? Where do we find an element of assignability herein under any law of either?

Why should a man who had been despoiled by seizure of his property or false imprisonment by the act of a Confederate cruiser, have the money donated to him by Congress taken from him and given to his assignee, any more than the soldier who had lost his leg have his pension pass to his assignee? Both are mere gifts.

Isn't it clear that here is no element of obligation on the part of the Government that constituted a property right in the donee?

The case also finds that part of this claim was for false imprisonment. Shall that pass to the assignee?

Congress passes many special acts to remunerate parties who suffered from starvation and ill-treatment in rebel prisons, but there has been yet no

attempt to have such gratuities pass to assignees. Indeed, Congress has manifested its determination that in the matter of the great body of claims known as the French Spoliation Claims, nothing shall pass to assignees in bankruptcy, or to creditors, or devisees at all, or even to administrators of the injured parties except to be distributed to the next of kin. (Deficiency Act of March 3, 1891.)

We submit that our case is distinguishable in all particulars from the case of the war premiums as decided in Williams *v.* Heard, *ubi supra*. The war premium claims had been submitted to the Geneva tribunal, and their amounts considered, and, as already stated in our brief from the record, the tribunal found our national losses in a gross sum, and it nowhere appears how that sum was made up. The war premiums might, as well as the losses of the insurers, make a part thereof; and therefore as it was before the tribunal it may be well said that some moral obligations arose to pay the insurers and to pay for war premiums.

As we have also seen, the claims of the insurers, for the loss of ships or any portion of them surrendered to the insurers, were rejected in Congress by a very heavy vote. The war premium matter was not brought before Congress at the time of the passage of the Act of 1874; but there may always have been, as the Court says, a "possibility" that such premiums would be paid. So that the Court may decide that there was something to pass to an assignee in bankruptcy under the wide terms of that Act, from the

money so paid by England; and this view is fortified by the fact that afterwards the war premiums were recognized in the latter Act. But as all losses inflicted by Confederate cruisiers in every sea and under any circumstances, whether they had anything to do with England or not, were provided for in that Act, those were clearly gratuities merely.

So far, we have discussed this question as to what the effects of the bankrupt laws of the United States would be upon the claim. Those were very stringent and searching, and provided that the commissioner, in addition to whatever passed by the words of the Act, should require a deed from the bankrupt of all his rights and claims, which deed was always given.

But here is an attempt to have it pass by a State Insolvency Law under a deed given by the Judge of Insolvency to the assignee in pursuance of the insolvent's voluntary petition. And although the State Insolvency Law contains in it a provision that the insolvent shall give a deed if required, to enable the assignee to get all of the property, especially that which is situated without the State, yet no such deed from the insolvent was given in this case.

Let us examine the deed under the Insolvency Act which is made a part of the case and marked "A" by the agreed statement of facts, but which by accident was not included in the record, and so is printed in an appendix to our brief as a part of the record under an agreement, also printed, as well as the

opinion of the Court below, all which will be found at pages —

The operative words of the deed are as follows:

"Now, therefore, I, John McKim, Esquire, Judge of said Court of Insolvency, by virtue of the authority vested in me by the laws ef said Commonwealth, do hereby convey and assign to said assignee all the real and personal estate of said Isaac H. Taylor, insolvent debtor, including all the property of which he was possessed, or which he was interested in or entitled to on the twentieth day of June, in the year of Our Lord one thousand eight hundred and eighty-three, excepting such as may be by law exempted from attachment, with all his deeds, books, and papers relating thereto."

It is not in controversy here that the insolvent laws of Massachusetts do not *proprio vigore* pass the property of any citizen which is out of the State and not in his possession, or which he could not lawfully convey or assign himself save in cases of prior fraudulent conveyances. The deed is carefully worded to pass property in the State only, because another provision of the insolvent law enacts under pains and penalties that the debtor may be required to give all conveyances which may be necessary or useful for confirming the assignment and enabling the assignee to demand, recover, and receive all the assets and effects so assigned, especially any part thereof, which is without this State. (Stat. of 1848, ch. 163, sec. 5.)

Now, there are several objections to the power of the State insolvent law to assign this claim.

If there was any claim against the United States due the debtor at the time of the assignment, then his assignment was prohibited by Sect. 3477 of the Revised Statutes of the United States, which enacts that

"All transfers and assignments made of any claim upon the United States, or any part or share thereof or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, *or other authorities* for receiving payment of any such claim or any part or share thereof, shall be absolutely null and void,"

unless the assignment shall be made after the claim is allowed and the warrant issued for the payment therefor.

If Taylor had any claim, legal, equitable, or moral, it was a claim against the United States, and it could not be assigned by himself. Upon this there never has been any controversy. The question, then, is, whether he could, by his voluntary act of insolvency, invest the State with power to do that which was prohibited by a law of the United States.

The effect of this section as to the transference of claims against the United States, which is a part of the Act of Feb. 26, 1853, has been as much litigated, perhaps, as any provision of a statute. It was at first decided only to be applicable and directory to the accounting officers of the Treasury, and not

binding upon the Courts or upon parties (8 Court of Claims, 252–281). In 1 Court of Claims R., and 12 Court of Claims R., different decisions were held. It was next held by the Supreme Court in Trist *v.* Child, 21 Wallace, 441, that the Act made all possible assignments void in all possible cases, and that it would be a "waste of time to discuss the subject." The conflicting decisions of the Court of Claims came before the Supreme Court again in Gillis' Case, 95 U. S. 407, and it was there held that the Act made all assignments void under all possible forms and in every case. And the Court says :

"We discover nothing that can justify our holding that, when Congress said 'all transfers or assignments, partial or entire, absolute or conditional, of claims against the United States, shall be null and void,' they meant they should be in operation only when presented to the accounting officers of the Treasury, but effective when presented everywhere else."

But the Court further says :

"There are devolutions of title by force of law, without any act of parties, *or involuntary assignments compelled by law*, which may have been in view."

The question again came before the Court in Erwin's Case, 97 U. S. 392–397, where it is decided that

"The Act of Feb. 26, 1853, applies only to cases of

voluntary assignments of demands against the Government. The passing of claims to heirs, devisees, or assignees in bankruptcy is not within the evil at which the statute aimed."

Mr. Justice Field delivered the opinion.

It again came before the Court in Spofford *v.* Kirk, 97 U. S. 484. After an exhaustive discussion, the Court says:

"It is hard to see how a transfer of a debt can be of no force as between the transferee and the debtor, and yet effective as between the creditor and his assignee to transmit an ownership of the debt, or create a lien upon it. Yet if that might be,—and we do not propose now to affirm or deny it, — the question remains whether the Act of Congress was not intended to render all claims against the Government inalienable alike in law and in equity, for every purpose and between all parties. The intention of Congress must be discovered in the Act itself. It was entitled 'An Act to prevent frauds upon the Treasury of the United States.' It may be assumed, therefore, that such was its purpose. What the frauds were against which it was intended to set up a guard, and how they might be perpetrated, nothing in the statute informs us."

"We do not say that the passage of the Act was induced by these considerations. It is enough that frauds and wrongs upon the Treasury were possible in either of these ways, and it may be that Congress intended to close the door against both. However that may be, the language of the Act is too sweeping

and positive to justify us in giving it a limited construction."

Mr. Justice Field did not sit in this case.

This is the latest emanation upon this subject from the Supreme Court of the United States. The Court has gone no further than to say that where the bankrupt law of the United States compels an assignment, when it concerns property, in so far it is a *pro tanto* repeal of the operation of the Act; and they termed a devise or descent or assignment compelled by law to be "devolutions of title."

In Leonard *v.* Nye, this Court, after discussing the provisions of the United States bankrupt law, decided, in consonance with Erwin's case, that an assignment in bankruptcy transferred a claim against the United States, as against the Act of February, 1853.

But it has nowhere decided that an assignment under an insolvent law of a State transferred such title, and especially an assignment upon a voluntary petition in insolvency. That might be one of the ways in which a party might commit a fraud upon the United States, and such assignment would be then one of the very "mischiefs" suggested in Spofford *v.* Kirk. The Court says:

"One [the frauds and mischiefs probably] was the possible presentation of a single claim by more than a single claimant, the original and his assignee, thus raising the danger of paying the claim twice, or rendering necessary the investigation of the validity

of the alleged assignment. Another and greater danger was the possible combination of interests and influences in the prosecution of claims which might have no real foundation, of which the facts of the present case afford an illustration. Within our knowledge there have been claims against the Government, interests in which have been assigned to numerous persons, and thus an influence in support of the claims has been brought into being which would not have existed had assignments been impossible."

The Court describes a large body of influential creditors interested in an enormous claim, the only asset of an insolvent.

In our case the insolvent's claim was for fifty-six thousand dollars, and it was the only "considerable asset," and the fact that he had a claim was not disclosed in his schedule.

This case presents the very "mischief" suggested in Spofford *v.* Kirk, *ubi supra*, that there might be more than a single claimant, the original and his assignee, thus raising the danger of paying the claim twice or rendering necessary investigations of the validity of the alleged assignment.

In this case the law devolved the claim upon the administratrix of Taylor. After the issuance of the warrant and after the check became payable, upon that direct title the claim was paid.

Now, assume that the Court should not adjudge this amount in favor of the assignee. Then, it never having been paid to the assignee, why is his money

not still in the Treasury, it never having been paid to him or to his order, and why may not the Treasury be again called upon for it? The adjudication of this suit, not being *inter partes*, will be no bar to that claim ; so, what the Court in its wisdom foresaw as a "mischief" has actually happened here ; the money for a claim has gone out of the Treasury, but not to the right party.

This matter will be adverted to hereafter upon the proposition whether this suit is rightly brought under the laws of the United States.

All this feared litigation and danger to the Treasury of the United States would be avoided if the direct language of the statute in regard to the transference of claims should be held binding by the Court.

In one case it was put forth that one reason why the bankrupt law of the United States could transfer a claim against this section, was that the bankrupt act might be held to repeal the restriction on transfers so far. Be it so. But certainly a State insolvent law cannot be held to affect a law of the United States one jot or tittle.

Another reason why the operation of this insolvent law, wholly brought into action by the voluntary act of the insolvent, cannot transfer this claim, certainly not before it is adjudicated, is that because it was in no sense ever within the limits of the State. The party when injured was not under the protection of Massachusetts or its laws, or on its territory, so that the claim did not arise there. Whenever the

claim should be perfected it must be under the laws of the United States, and everything concerning it must be done at Washington in the District of Columbia, and dependent upon the force and effect of the United States laws, and those only.

Crapo *v.* Kelly, 16 Wallace, p. 611.

Until the enactment of a recent statute, the attachment laws and the insolvent laws of Massachusetts never applied to property in a patent held by a citizen of Massachusetts so as to transfer it. And why? Because such property was held under the laws of the United States only. Was not this the exact condition of this claim in this regard if it was property at all?

It nowhere appears in the award of the arbitrators on what item the award was found. If it was all on his claim for imprisonment, uncollected damages for false imprisonment are not assignable under our insolvent laws. If the award was for damages, or false imprisonment, certainly he had no assignable property in that.

Stone *v.* Boston & Maine R.R., 7 Gray (Mass.) R. 539, expressly decides that uncollected claims for torts do not pass under the insolvent laws of Massachusetts.

If part was for personal effects, and part for damages to the person, then the fact not being found how much was for either, the burden is upon the defendant in error to prove that, when he claims to recover for money he had received, as his property.

The personal effects would not pass by the assignment, because it only operates upon real and personal property not exempt by law from attachment, and the burden is upon the defendant in error to prove how much was money so received by the plaintiff in error from the class of personal effects not so exempted, and the property lost, being his personal effects on board ship, would in whole or in part be exempt from execution.

The mingling of the proceeds of these two classes of claimed rights in the award was not the fault of the plaintiff in error, and if this claim can be maintained at all it should be by a bill in equity brought under the law of the United States to have an accounting, so that it might be determined how much belonged to each. If it be said, which is true, that claims which come from personal injuries do not pass to the administratrix, as is the rule of the common law, and that then this part of the award would not go to his widow, as administratrix, who is here the party in fact, then it is answered that it descends to her as next of kin; or at least her possession is not to be disturbed. Certain it is that personal effects and money received for them devolve upon the administrator.

Is the Massachusetts Insolvent Law, as enforced, Constitutional?

It is not necessary for our case that we should ask this Court to decide that States may not constitutionally pass insolvent laws affecting wholly their own

citizens and applicable to their property, only when that property is within the borders of the State, and which do not apply, and are not attempted to be applied, to property wholly outside the territorial or State jurisdiction or held solely under the laws of the United States, and which do not impair the obligations of contracts.

It may be admitted that such an insolvent law is constitutional so far as our case is concerned. But we believe that when State insolvent laws are practically and in effect bankrupt laws, operating in any degree, in any way or form outside of the State, affecting any property of a citizen of that State or any other, such laws are in contravention of the power reserved to Congress exclusively to establish uniform laws on the subject of bankruptcy.

Of course we are not ignorant of the early discussions as to the State insolvency laws in Sturgis *v.* Crowinshield, wherein the Court divided in opinion upon the general question of the power of the State to pass insolvent laws, and where Chief Justice Marshall stood at the head of the dissenters. The question in that case was decided against any power in the State to impair the obligation of contracts, and Mr. Justice Johnson, upon the main question, was against the constitutionality of State insolvent laws. Thus the matter stood until the celebrated case of Ogden *v.* Saunders, 12 Wheaton, 213, where, after laborious discussion and a divided Court, and in accordance, as it was said, with a decision upon like clauses of the Constitution, it was held that a State

might pass laws operating solely upon persons, property, and contracts within its own borders, and might discharge its citizens from the consequences of contracts between themselves, within its own borders, if the contracts were to be performed within its own territory, in reference to parties living on its own soil.

It took about three terms of the court and a declaration by Chief Justice Marshall, that that case would be followed hereafter, on account of the changes of opinion of some of the judges, to establish this doctrine as the doctrine of the Supreme Court, and it has not been attacked since, although attempted to be argued in a full court when Chief Justice Marshall said that it must be held to be "settled law," and that a State may pass some kinds of insolvent laws while Congress does not pass uniform laws in regard to bankruptcy.

This has prevented any discussion of this question, and it may be not improper for me to suggest that as its decision might affect the action of the Court on all the reserved powers in the 8th section of the 1st Article of the Constitution, it was desirable at that date to let it pass in silence, and that this determined the course taken by the Chief Justice.

The Court may say to me, being "settled law," Why do you venture to make an argument upon it? To that I reply, "I should not, although for many years I have not concurred with the results of the luminous opinion given by Marshall which he never retracted. In those days the tendency of State action was to

usurp all the powers possible to the jurisdiction of the State that were given to Congress by the Constitution as claimed not exclusively, when Congress did not act upon them, the Democratic doctrine being that as few of the functions of government should be exercised by the United States as possible, under the Constitution. Mr. Jefferson himself believing that the title of the United States should be "The Department of Foreign Affairs of the United States," endeavored with his great power to make the General Government here as nearly like that as possible.

Therefore, so reluctant was Congress to act under its reserved powers, and so active were the encroachments of the State governments on the power of Congress, that to settle the doubts as to the jurisdiction of each it became necessary to adopt Article 10 of the Amendments, which was done Dec. 15, 1791.

It is a curious fact that by the decisions of the judges all united in determining against any insolvent laws that had any effect extra-territorially on persons or matters of property, or upon the obligations of contracts, so as to partake of the nature of a bankrupt law, which laws were set aside. And it is also true that the State insolvent laws could have no effect if Congress exercised its exclusive power of establishing uniform laws of bankruptcy ; so that when Congress passed the Bankrupt Law in 1802, by general consent the insolvency laws of the States ceased their operation. And this was also true of the Bankrupt Laws

of 1842 and 1867. This was done almost by general consent.

During the existence of the bankrupt laws, because apparently the two could not exist together, the somewhat anomalous doctrine was held that the repeal of the bankrupt laws immediately revived the insolvent laws without any action upon the part of the State to put them on their feet again, in full health and vigor. I have ventured to say "anomalous," because the insolvent law became a law which had no constitutional existence, as soon as the bankrupt law was established; and thus, being a law of the State, dead for want of constitutional capacity for its existence, how the Congress of the United States, by a repealing act only, could breathe the breath of life into such a law, was a question concerning which, if the affirmative may not be permitted to be controverted, may not one be curious about the negative?

The doctrine was held also in regard to almost all constitutional powers of Congress to enact laws set forth in Section 8 of the first Article of the Constitution, the Supreme Court holding in substance that where Congress did nothing in regard to those powers it was lawful for the State to pass acts as to the same to govern its own citizens and establish rules, regulations, and laws for its own territory, which would become abrogated or suspended as soon as Congress should act thereon ; such as to regulate commerce among the several States and with the Indian tribes ; to establish a uniform rule of naturalization. (Some States, although Congress passed a law to establish a

uniform rule of naturalization, which required a long residence to make a citizen of the United States, passed laws to make their own alien-born inhabitants citizens of the State, who thereby became citizens of the United States, and these laws have not been interfered with by the courts of the United States.) Also, to establish uniform laws on the subject of bankruptcy throughout the United States; to fix a standard of weights and measures ; to provide for the punishment of counterfeiting the securities and current coin of the United States; and to provide for organizing, arming, and disciplining the militia, and to prescribe for training the militia according to the discipline prescribed by Congress. We believe that in all of the particulars which we have enumerated it has been held that, in the absence of regulation by Congress, the States might make laws for their own citizens; and notwithstanding the power of Congress over interstate commerce, and the regulations which affect not only coastwise commerce between the States, but also foreign commerce, they have set up State systems of pilotage, Congress not having interfered. Congress having failed to pass laws about counterfeiting United States securities and coins, the States have passed such laws. Failing to establish standard weights and measures, the States have adopted standards for their own citizens within their own territory; but the doctrine has always been held that this could only be done while Congress was silent, because there was then no conflicting system.

I now make my apology for arguing this question

and maintaining these opinions, in this, that I do it in part at the invitation of this Court, for in the case of Wabash Railway Company *v.* Illinois, 118 U. S. 557, the Supreme Court has settled it that this view of the question was erroneous, and has established the doctrine that where a State by statute has made laws concerning the transportation of its own citizens and their property within its territory, and such laws may interfere in their effect with the rights, privileges, and immunities of citizens of other States, although regulating only what is done in its own State, the making of such laws is forbidden by the Constitution, because the right to regulate commerce between the States is solely committed to Congress, although Congress had not exercised that power.

In other words, that the States, because of the reservation by the Constitution of the control of interstate commerce to Congress, although Congress had not exercised that power, are forbidden by the Constitution to exercise it in regard to its own citizens. Or, in other words, that the reservation of a power over a given subject, to Congress, makes that power exclusive in Congress, whether exercised or not.

The case of Ogden *v.* Saunders decides by a bare majority of the judges, a majority of whom had given dissenting opinions to that propositisn, that the powers reserved to Congress to establish a uniform system of bankruptcy is not an exclusive power in Congress unless exercised, and that the States may go on and establish bankrupt laws conflicting in

their systems, unless Congress absolutely establishes such a uniform system.

Or, in other words, that the power to establish a uniform system of bankruptcy is not exclusive in Congress.

I am further emboldened to make this argument because in Sturgis *v.* Crowninshield, 4 Wheaton, 193, Chief Justice Marshall, in delivering the opinion of the Court, said:

"The principle laid down by counsel for the plaintiff in this respect is undoubtedly correct. Whenever the terms in which power is granted to Congress, or the nature of the cause requires that it shall be exercised exclusively by Congress, the subject is as completely taken from the State Legislature as if they had been expressly forbidden to act upon it."

It is agreed that the insolvent law of Massachusetts, because of its bankrupt provisions, is simply suspended by the passage of any bankrupt law by Congress.

But I make a further proposition, that in the wisdom of that body it may be determined that in order to have a uniform system of bankruptcy it is best to have *no bankrupt law at all.* In 1802 Congress decided that it was best to have a bankrupt law, and it tried it for a very few years, and then repealed it, and the repeal stood until 1842, when, in an exigency, it was thought best to have a bankrupt law, and it enacted one. That existed until 1846. Again, in 1867, Congress found that a uniform system of bankrupt law was needed different from the one then in

existence by non-establishment, and it passed one, but soon repealed it, thus saying in fact that the best uniform system was to have no bankrupt law.

There have been several attempts made to pass a bankrupt law since, all of which have failed.

Now, how can it be said that the action of Congress in repealing the bankrupt law could have the effect of bringing into being a large number of ununiform systems of bankruptcy established by States under the name of insolvent laws, containing all the powers of bankrupt laws, particularly the power of discharging the obligations of contracts?

Sturgis *v.* Crowninshield decides further that "it is the opinion of the Court that the Act of the State of New York, which is pleaded by the defendant in the case, so far as it attempted to discharge this defendant here, the deed in the declaration mentioned is contrary to the Constitution of the United States, and the plea is no bar to the action."

The Massachusetts insolvent law is an absolute system of bankruptcy. It declares insolvency, takes the property of the citizen of the State upon its own territory and gives it to a certain class of the creditors of the insolvent, and then discharges him from all his debts and relieves him from all his contracts. Nay, more, it compels a transfer to the officer of its court of the property of its insolvent citizen in another State for the benefit of the creditors in Massachusetts, although it may be a fund to secure his creditors in that State. And this law thus interferes with the property in other States on which the inhabitants

of those States should have the right to secure their debts, and which they would have a right to have applied to their contracts, and transfers it to a foreign assignee for the benefit exclusively of foreign creditors, unless the citizens of the other State shall leave the State where they live and the property is situated, and abandon the laws of their own State by which their debts may be secured, and consent to divide that property with another class of creditors; and if they do this, the laws cancel the obligations of their debts and contracts.

Let us illustrate this by a supposed case: A debtor in Massachusetts having no appreciable assets therein, we will say, owes one hundred thousand dollars in that State. He applies to its courts and is declared insolvent. But he has debts in another State amounting to a hundred thousand dollars, where he has property of quite an equal amount out of which they may be paid under the laws of their own State. The judge makes a deed to the assignee of the insolvent's property in Massachusetts which conveys nothing; but the insolvent is compelled by law to give deeds, checks, and drafts whereby all his property in the foreign State shall be transferred to his assignee under pain of punishment by imprisonment without limit of time. Under those conveyances all the property will be conveyed to the Massachusetts assignee, leaving his creditors in the foreign State from whom that property had been obtained, and to which they looked for reimbursement of their contracts, to follow it to Massachusetts; and if they do so, they must

share it with all the creditors in Massachusetts, where there was no property to secure them, upon a penalty on the part of such foreign creditors of sharing their foreign property with the Massachusetts creditors, however small the dividend they may obtain, and having all the obligations of their contracts discharged, and the debtor also set free from his contracts in his own State. That that foreign State might be Oregon only intensifies, but does not alter, the principle of this proceeding.

Can it be said that such a law so enforced is not a bankrupt law to every intent and purpose, interfering by the most stringent provisions and penalties with the property-rights and contracts of citizens of other States? And this, too, without any provision for notice under the insolvent law of Massachusetts to any foreign creditor, unless his debtor chooses to put him on his schedule (and there is no penalty if he does not do so), save a simple publication of the messenger's notice in a paper twice published in the county in which the insolvent resides, however remote or unknown, — for example, "The County of Nantucket."

May not this bankrupt law interfere very formidably with the rights of citizens of other States — quite as much so as the transportation laws of Illinois, though made for its own citizens, may interfere with the rights of citizens of other States?

If so, then is not the decision in Wabash Railway Company *v.* Illinois directly in point that the Constitution forbids the passage of any such law because it

is within the scope of the power delegated to Congress to establish a uniform system of bankruptcy? Indeed, does not the word "establish," *i.e.*, to make or maintain a system, of greater significance than the words "regulate commerce with foreign nations and among the several States," and does it not by the very force of language show that it was the intention of the Constitution to put all bankruptcy matters wholly within the power of Congress, as a bankruptcy law ought to and does affect the people of all the States uniformly?

We do not mean to say that there may not be insolvent laws, *i.e.*, laws discharging the body of the debtor, leaving the contracts to stand, or discharging the remedies against the insolvent where they do not interfere with the contract, passed by the States, whether there is or is not a uniform system of bankruptcy; or, in the language of Sturgis *v.* Crowninshield, "although the States may, until that power shall be exercised by Congress, pass laws concerning bankruptcy, yet they cannot constitutionally introduce into such laws a clause which discharges the obligations the bankrupt has entered into."

If the Court, therefore, finds that the Massachusetts bankrupt law impairs the obligation of contracts between citizens, that law is unconstitutional, irrespective of the question whether it may pass other insolvent laws when Congress has not acted upon the subject of bankruptcy. But, as the Court says, that provisions as to insolvency may be parts of bankruptcy laws, we insist that the power of Congress

to establish a uniform system of bankruptcy should be held, as the Court has established the power of regulating interstate commerce, exclusive. Indeed, is not the whole question decided by Sturgis *v.* Crowninshield and Ogden *v.* Saunders, this, and no more: That States in the absence of congressional action on the subject of a uniform system of bankruptcy may pass insolvent laws that do not interfere with the obligations of contracts, and are simply regulations of the conduct of their own citizens in their own territory; and even then, when Congress acts, that power departs from the State? Whether Congress acts or not, the power no longer resides in the State to pass a bankruptcy system that impairs the obligations of contracts.

We have remarked upon fact that all the early decisions which are relied upon as establishing the capacity of the State to pass insolvent laws, set aside any discharge given by such laws of the debtors from their obligations. Upon the principle of the late decision concerning interstate commerce regulation, is there not now a system of uniform bankrupt laws in force such as Congress chooses to have, and with which the States are forbidden by the Constitution to pass laws to interfere? If so, how can our admitted conflicting system of insolvency have existence? It operates on property in other States; it compels under pain of punishment the insolvent to convey his property in other States to the use of the creditors in our State.

In the case at bar it is claimed that the official

deed of assignment takes property from the Treasury of the United States and deprives the administratrix in the District of Columbia from receiving it to be distributed among the creditors of the debtor there. In other words, our system of insolvency is a system of bankruptcy which is enforced in other parts of the Union as well as our own, and is therefore unconstitutional.

We claim in addition that when the Act of 1867 was passed, our insolvent laws expired because in conflict with the law of the United States, which was paramount, and that when that was repealed such repeal could not and did not reënact or revivify our law.

1. Admitting the insolvent law to be constitutional, we claim that this official deed of assignment did not pass this claim to the assignee, because the assignment was the result of a voluntary petition of the insolvent, and was his act, and not the act of the law.

2. Because the assignment, being a voluntary one, was null and void by the provisions of the Act of the 26th of Feb., 1853. (Rev. Stat., sec. 3477.)

3. As we have hinted before, because, being simply the act of a State officer, and not the act of the insolvent personally, it has no force beyond the line of the State.

Lastly, we are permitted to observe, that so far as we understand the matter our argument interferes with the decision of Sturgis *v.* Crowninshield and Ogden *v.* Saunders and the cases following thereon

only in this: That the grant of power to Congress to establish a uniform system of bankruptcy is exclusive when not acted upon by Congress, grounding ourselves upon the case Wabash Railway Co. *v.* Illinois, *ubi supra*. But those cases are equally strong, that no bankrupt laws discharging the obligations of contracts can constitutionally be passed by the State, that power being expressly reserved to Congress and inhibited to the States.

Will the Court permit a single further suggestion:

The Court below treat this claim in their decision as one arising from the acts of one of the inculpated cruisers passed upon by the first Court of Alabama Claims, and take no note of the fact that the provision for it was a simple gratuity. The opinion says: "If the claim is established in pursuance of what would have been an antecedent legal duty on the part of the sovereign, but for its sovereignty, the proposition which we lay down follows *a fortiori* from decisions like Leonard *v.* Nye, etc.," ignoring the distinction between what is simply a gratuity given by the United States, and its provision of a remedy for a legal or equitable claim against itself, withheld only because of its sovereignty.

That distinction so omitted by the Court below properly followed out according to the argument of the brief will, it seems to us, determine the cause.

All which is respectfully submitted.

BENJ. F. BUTLER.

APPENDIX.

AGREEMENT TO AMEND RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 252.

BENJAMIN F. BUTLER, Plaintiff in Error,

v.

CHARLES P. GORELEY, Assignee of Isaac H. Taylor.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

In this case it appearing that there is a diminution of the record by the omission of the copy of the deed of assignment in insolvency issued to the defendant in error as assignee of the estate of Isaac H. Taylor, and the further omission of the opinion of the Supreme Judicial Court of Massachusetts in said case as reported in the 147th Massachusetts Reports, page 8, it is agreed between the parties that the same may be clearly printed uniform with the copy of the record, and attached thereto, to be used by the Court to the same effect as if the several papers had been sent up with the copy of the record attached to the writ of error.

BENJ. F. BUTLER,
pro se.

CHAS. LEVI WOODBURY,
For Defendant in Error.

EXHIBIT "A."

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

COURT OF INSOLVENCY.

[SEAL.]

IN THE CASE OF

ISAAC H. TAYLOR,

OF BOSTON IN SAID COUNTY,

Insolvent Debtor.

Know all Men by these Presents: That, Whereas, Charles P. Goreley, of said Boston, has been duly appointed Assignee in said case;

Now, therefore, I, John W. McKim, Esquire, Judge of the said Court of Insolvency, by virtue of the authority vested in me by the laws of said Commonwealth, do hereby convey and assign to the said Assignee all the estate, real and personal, of the said Isaac H. Taylor, Insolvent Debtor, including all the property of which he was possessed, or which he was interested in or entitled to on the twentieth day of June in the year one thousand eight hundred and eighty-three, excepting such as may be by law exempted from attachment, with all his deeds, books, and papers relating thereto.

To have and to hold all the above-granted premises to the said Charles P. Goreley and his heirs, forever; *In trust, nevertheless,* for the uses and purposes, with the powers and subject to the conditions and limitations set forth in the laws aforesaid.

In Witness Whereof, I, the said Judge, have hereunto set my hand and caused the seal of said Court to be affixed, on this twentieth day of July, in the year one thousand eight hundred and eighty-three.

JOHN W. McKIM,
Judge of the Court of Insolvency.

Copy of record.
Attest:

[SEAL.]

JOHN H. PAINE,
Assistant Registrar.

OPINION OF THE SUPREME COURT OF STATE.

HOLMES, J. So far as appears, the claim of the insolvent for losses by a tender of the "Alabama" was within the Act of Congress of June 23, 1874, and therefore probably this case is governed by Leonard *v.* Nye, 125 Mass. 455; Jones *v.* Dexter, 125 Mass. 469, 471. But it is necessary to stop at this point, because, whatever the original matter of the claim, the Act of June 5, 1882, had been passed, and proceedings under it had been begun by the insolvent before the dates when he filed his petition in insolvency and the plaintiff was made his assignee.

The Insolvent Act provides that "the assignment shall vest in the assignee all the property of the debtor, real and personal," etc. See Pub. Sts., c. 157, § 146. When the sovereign power has established a claim against itself, or against a fund in its hands, and has provided a tribunal and all necessary machinery for its establishment and collection, such a claim is "property" within the meaning of the act.

If the claim is established in pursuance of what would have been an antecedent legal duty on the part of the sovereign, but for its sovereignty, the proposition which we lay down follows a portion from decisions like Leonard *v.* Nye, Jones *v.* Dexter, *ubi supra*, and Comegys *v.* Vasse, 1 Pet. 173; that some claims against the sovereign will pass in bankruptcy or insolvency, although the act which recognizes and makes them effectual is not passed until after the assignment. These cases dispose of any general objection that claims against the sovereign cannot be legal rights in a strict judicial sense. Such claims are given also the incidents of property by law, although since the continued recognition of them until they can be proved, and the final payment of them, depend upon the will of the sovereign; that is, upon the law remaining unchanged, as is the usual case of claims against subjects, such recognition and payment in this case depend upon the honor of the *quasi* debtor or trustee, and not upon a sovereign power, stranger to the undertaking.

The English Courts, although they have hardly gone so far as

the Courts of this country, have treated as property within the English Bankrupt Act a pension granted on the retirement of a public officer (possibly in pursuance of some sort of understanding at the time of his taking office) which depended for its payment on an annual vote of a colonial legislature. *Ex parte* Huggins, 21 Ch. D. 85. In this case, it is suggested, and we agree, that it could not be doubted that bonds of a foreign or of the home government would be property.

If now the claim which the statute establishes, instead of being based upon some sort of consideration, is granted as a pure gratuity, as in Heard *v.* Sturgis, 146 Mass. 545, still, when granted, it is just as absolute a claim; it is to the same extent and in the same sense a legal claim, and it has the same security for being paid, as the other. It depends upon the will of the sovereign no more than the other. It is not like the case of an allowance depending for its continuance on the will of a private individual who prays it, as in *In re* Wicks, 17 Ch. D. 70, or upon the discretion of a subordinate public officer, as in *Ex parte* Webber, 18 Q. B. D. 111.

It was argued that, by force of the U. S. Rev. Sts. 3477, this claim could not be assigned in insolvency before it was allowed. Assuming that that section applies to claims like the present (Stevens *v.* United States, Feb. 26, 1883, in Rules, Opinions, etc., of Court of Commissioners of Alabama Claims, Washington, of 1885), it does not apply to assignments in bankruptcy, although upon a voluntary petition (Erwin *v.* United States, 97 U. S. 392), and by parity of reasoning it does not apply to assignments in insolvency. If it should be suggested that, although property of the insolvent, it was not property "which he could have lawfully assumed" in person, and therefore was not within the words of the State Insolvent Act, the answer is, that it is clearly within the general intent of the Public Statutes, c. 157, §§ 44–46, and that it is clearly within the specific words, "right of action for goods or estate, real or personal" (Jones *v.* Dexter, *ubi supra*).

It was suggested that we should reconsider the question of the constitutionality of the State Insolvent Law, on the ground of a recent decision of the Supreme Court of the United States upon

the clause of the Constitution touching the regulation of commerce. Wabash, St. Louis, & Pacific Ry. Company *v.* Illinois, 118 U. S. 557. We discover no indication in that case that the majority intended to disturb the decision in Ogden *v.* Saunders, 12 Wheat. 213, and the cases which have followed it. If what has been understood for sixty years to be the law, and what the Supreme Court of the United States has pronounced "settled and forever closed," is to be overthrown, it must be done elsewhere than in this court. Baldwin *v.* Hale, 1 Wall. 223, 228; Boyle *v.* Zacharie, 6 Pet. 348; s. c. 6 Pet. 635, 643; Blanchard *v.* Russell, 13 Mass. 1, 16; Day *v.* Bardwell, 97 Mass. 246, 250; Barton *v.* White, 144 Mass. 281.

Finally, it was argued that this action could not be maintained against the present defendant. We see no ground for doubt. The plaintiff had no notice of the proceedings instituted by his insolvent until the latter had got his judgment and a draft for the amount was in the defendant's hands. Then the plaintiff demanded the draft, and was entitled to receive it. Quimby *v.* Carr, 7 Allen, 417; Cook *v.* Holbrook, 6 Allen, 572, 573; Cox *v.* Prentice, M. & S. 344. The fact that the defendant subsequently advised the widow of the insolvent to take out administration in Washington, that she did so, and that he signed her bond, with an agreement that he should retain the draft as security, cannot better his case. It is asked why, if the claim of the insolvent passed to the plaintiff, he cannot recover against the United States, notwithstanding a payment by them to the wrong person. The answer is, that it is settled that the effect of the judgment of the Court was to appropriate a fund to the claim, and to transfer the claim to that fund, leaving the question of title open to subsequent litigation in the ordinary courts. The statute does not leave the United States subject to be charged a second time, any more than on the other hand it makes the decision of the Court of Commissioners of Alabama Claims conclusive as to the person entitled to its bounty.

Judgment for plaintiff.

EXTRACT FROM THE JOURNAL, NO. 5.

[First] Court of Commissioners of Alabama Claims.

ISAAC H. TAYLOR *v.* THE UNITED STATES.

No. 2064.

The Court having heard the proofs and arguments submitted by the respective parties in this case and their counsel, and having duly examined and considered the same, do now (all the judges present concurring) dismiss the petition.

Extracts from the Record of the [Second] Court of Commissioners of Alabama Claims.

ISAAC H. TAYLOR *v.* THE UNITED STATES.

No. 5725, Class 1.

(Isaac H. Taylor being produced as a witness in his own behalf testified as follows:)

Int. 112. [Rec., p. 16.] Did you make application for this loss in the former Court of Alabama Claims?

Ans. I did.

Int. 113. What became of it?

Ans. It was returned, as not coming under the "Alabama" or her tenders. The "Georgia" was an exculpated cruiser.

Int. 114. So you did not take any testimony under that petition?

Ans. I did not.

Int. 115. I notice that this petition was filed the last day, or near the last day, of filing petitions under the law: why was this?

Ans. [p. 17.] I was unable, owing to the death of my father, to procure the necessary papers, and I did not learn until a late day that the "Georgia" was included in the present law.

Int. 116. As soon as you learned that the "Georgia" was included in the present law, do I understand you that you proceeded to consult counsel and prepare the present petition?

Ans. I did.

146 US 303

Office Supreme Court U. S.
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BENJ. F. BUTLER, *Plaintiff in Error*,
vs.
CHARLES P. GORELEY.
No. 20.

SUPPLEMENTAL BRIEF.

Since the first preparation of the brief in this case the case of Williams *vs.* Heard has been reported (U.S. R., 140, p. 599), which has been cited by the defendant in error, and on which it is desirable some comment should be made. We look upon that case as favorable to our contention. In the first place, it decides the questions we raised are properly in this Court; second, the decisions are based upon the case of Comegys *vs.* Vasse and Phelps *vs.* McDonald.

The Court say: "In our opinion this case falls within the "principles of Comegys *vs.* Vasse and Phelps *vs.* McDonald, "and the judgment of the Court below is reversed."

In the first case Mr. Justice Storey says (1 Pet., 217):

"We may now come to the point, which indeed is the only "one of any intrinsic difficulty in the cause, whether the right "so vested in Vasse to compensation passed under the bank- "er's assignment to his assignees. That this is a question "not free from doubt will not be affirmed by any person who "has thoroughly examined it, or read with care the elaborate "opinion of the Court below. The true solution of it must "be found in a just exposition into the objects, intent and lan- "guage of the Statutes of Bankruptcy of 1800, chap. 19."

What was the right which would so pass?

"In general it may be affirmed that mere personal *torts*, "which die with the party and do not survive to his personal "representatives, are not capable of passing by assignment; "and that vested rights *ad rem* and *in re* possibilities, coupled "with an interest, and claims growing out of and adhering to "property, may pass by assignment."

Justice Storey then proceeds to analyze the Bankrupt Act, and determined that it would pass every possible interest which could exist in the bankrupt, because the Act covered

profit, possibility of profit, benefit, or advantage whatsoever. The words used show that mere interests *in presenti* and capable of present enjoyment were not alone within the scope of the legislative enactments; but, also such interests or possibilities of interests as might thereafter beneficially arise from present vested rights.

The case farther decides that the rights of *Vasse* to an indemnity secured to him by the treaty were actually vested in him thereby at the date of the bankruptcy.

Williams *vs.* Heard decides that the war premiums of insurance (p. 541) were recognized by the Government of the United States as valid claims, for which satisfaction should be guaranteed. There was, thus, at all times a possibility that the Government would see that they were paid. * * * But the Act of Congress did not *create* the rights; they had existed at all times since the losses occurred. They were created by reason of losses having been suffered. All the Act of Congress was to provide a remedy for the enforcement of the right. * * * Neither do we think that the money appropriated by Congress by the Act of 1882, to pay these claims, should be considered merely as a gratuity.

Again, nevertheless, there was at all times a moral obligation on the part of the Government to do justice to those who had suffered in property.

We distinguish our case from *Vasse* and *McDonald* in these: First, under treaty, a sum of $5,000,000 was paid the United States by Spain to indemnify Vasse and others, and remained in the Treasury of the United States, and a commission was provided for by treaty to ascertain what the amount of that indemnity should be. That, of course, vested a right in Vasse to that indemnity from the date of his loss, when his claim arose against Spain. And that was the *res*, and that his right to it.

And although Storey's decision was only the majority of the court on that point, we have no occasion to combat it.

So in McDonald's case. There lay in the Treasury of the United States to be adjudged to him by a commission under an act of Congress, a large sum for property taken

from him by the U. S. Army during the war, he being a British subject. Not only a *jus ad rem* and *in re*, but a possibility coupled with an interest. In both cases there was not only an equitable, but a legal claim in process of enforcement against the Government.

Taylor had had his personal effects destroyed, and been imprisoned by the Georgia for whose acts England has been exculpated by the unanimous judgment of the Geneva Tribunal. No money had been paid and no adoption of his claim by the U. S. Where did any moral or legal or equitable claim arise in his favor for personal and other injuries done him, other and different from what every other citizen of the U. S. injured during the war by land or by sea had against the Government? The Court will pause long, we trust, before they decide that by any principle of public or municipal law a citizen injured during that public war, after its declaration, has any legal, equitable, moral or fanciful claim to be paid for it by the Government. And if the Government chooses to so pay him, is it not, in the language of Justice Storey, "a pure donation?" And, if so, does any right vest in him to that donation until he receives it and a *multissimo fortiori*, can it be taken from him by his assignee in insolvency? It could hardly be done after he gets it, being but a result of the loss of his personal effects on board ship and his imprisonment there in a foreign sea, neither of which could pass to a creditor.

It will be observed that Taylor petitioned for it to the first Court of Alabama Claims, and his petition was thrown out by the Court because the Georgia was an exculpated cruiser.

He petitioned again before the Second Tribunal and his assignee also petitioned, and the Court decided, that the money should be paid to him, and it was paid to his personal representative after his death. We observe that the Court has decided that, in the opinion in Williams *vs.* Heard, said that the decision of the Court as to whom the money is to be paid, is not conclusive, that their whole duty was done when they found what the loss in a given case was. But as the statute required the Court to certify to the Secretary of the Treasury to whom it should be paid, one might suppose

that their duty was a little broader than stated in the opinion.

Their decision of that question is irreversible, yet, no appeal taken, there seems to be a necessity for their making one, especially in the case of a pure donation.

To illustrate this question, suppose the Court should find that a given loss was suffered by a given depredation in the South Seas, and stop there, who could get the money? But our case goes farther. The Court record in this case finds that the defendant in error, Goreley, the assignee, filed an intervening petition, which was thrown out. He having once submitted his claim to its jurisdiction, made a reference of it, and should be stopped from disputing the result of that reference.

We claim also, in review of Williams *vs.* Heard, that the Court of Alabama Claims was a full judicial Court; it was so organized by the statute; its adjudications are called judgments, and there being no appeal in this case taken, as none is provided, that its judgments, which are to be enforced by the Secretary of the Treasury, by payment when for the Complainant *vs.* The United States, are irreversible in all parts by decisions made by virtue of the statute.

This statute requires that to ascertain who is the claimant; whether he is entitled to protection by the United States, whether he has ever been loyal, and certify the fact of that judgment to the Secretary of the Treasury.

Those facts being found by the Court and so certified, the amount is to be "paid to him or his legal representative," and those facts must be verified to the Court by the oath of the complainant.

If a derivative title is presented still those facts must be so verified; but that may not be considered because this adjudication was in favor of the claimant in person.

How can any part of that judgment be set aside by another court?

Benj. F. Butler.

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BRIEF FOR DEFENDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1891.~~ 1892

No. ~~252.~~ 20

BENJAMIN F. BUTLER, PLAINTIFF IN ERROR,

v.

CHARLES P. GORELEY, ASSIGNEE, DEFENDANT IN ERROR.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

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IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

Supreme Court of the United States.

BENJAMIN F. BUTLER, PLAINTIFF IN ERROR,

v.

CHARLES P. GORELY, ASSIGNEE, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

I.

STATEMENT OF THE CASE.

This is an action for money had and received, brought by the defendant in error against the plaintiff in error, Oct. 20, 1886, in the Superior Court of Suffolk County, Massachusetts. The action was entered in court on the first Monday of November, 1886. The facts were agreed (Record, page 6).

Isaac H. Taylor, on or about June 14, 1863, was a passenger on the high seas on the bark "Good Hope," which on that day was captured and destroyed, together with said Taylor's personal effects, amounting as he claimed to $5,350, by a tender of the Confederate cruiser, "Alabama." (Record, folios 11 and 12, page 6.)

On Jan. 13, 1883, said Taylor filed his claim in the Court of Commissioners of Alabama Claims, and afterwards recovered a judgment thereon against the United States for $5,874.15. (Record, folio 12, page 6.) On June 20, 1883, said Taylor filed his petition in insolvency in the Court of

Insolvency of said County of Suffolk, on which he was duly adjudged an insolvent debtor. On the 20th day of July, 1883, the defendant in error was duly appointed assignee in insolvency of said Taylor, and on the same day the judge of said court assigned and conveyed to the defendant in error, as such assignee, all the estate, real and personal, of said Isaac H. Taylor, including all the property of which said Taylor was possessed or which he was entitled to on the 20th day of June, 1883, excepting such as was by law exempt from attachment. See the Deed in the Appendix

The various meetings of creditors were held at which creditors of said Taylor proved claims. The schedule of assets did not disclose the claim of said Taylor against the United States. There was no other asset of any value received by the assignee, and no discharge was ever granted by the insolvent. (Record, folio 11, page 6.)

On Feb. 20, 1885, the treasury draft in payment of the judgment on said claim of Taylor was mailed to the plaintiff in error, E. J. Hadley and E. L. Barney, attorneys of record at 16 Pemberton Square, Boston, which was received in due course of mail. On Feb. 24, 1885, said draft being then in the hands of the plaintiff in error, said Isaac H. Taylor died at said Boston without having indorsed said draft. (Record, folios 12 and 13, page 7.)

While said draft was in the hands of plaintiff in error, and before there was any application for administration on said Taylor's estate, the defendant in error, at Boston, demanded said draft of the plaintiff in error, and at the same time notified plaintiff in error that he, defendant in error, was the assignee in insolvency of the estate of said Isaac H. Taylor, and that as such assignee, he was entitled to said draft and its proceeds. (Record, folio 14, page 7.) Subsequently, Sallie B. Taylor, of Duxbury, in Plymouth County, Mass., the widow of said Isaac H. Taylor, under

advice of plaintiff in error, on March 31, 1885, on her petition filed March 7, 1885, on giving bond with surety, was appointed administratrix, by the Probate Court of the District of Columbia, of the estate of said Isaac H. Taylor. No appraisal or inventory of estate was ever made or filed, and nothing further, so far as appears, was done by her in the Probate Court. (Record, folios 13 and 14, page 7.)

On April 4, 1885, Sallie B. Taylor, of Duxbury, in the county of Plymouth, and State of Massachusetts, executed an instrument to plaintiff in error of Lowell, Mass., and acknowledged the same in Suffolk County, Massachusetts, before a notary public at Boston, to indorse her name on said draft and receive payment thereon, etc. (Record, folio 16, page 9), and on April 6, 1885, plaintiff in error received the amount of said draft to wit, $5,874.15. (Record, folio 15, page 8.) The plaintiff in error became surety for her on her bond as administratrix, agreeing with her to retain the draft and its proceeds as security for his suretyship on her said bond. (Record, folios 13 and 14, page 7.)

II.

Jurisdiction.

Both parties to this suit were and are citizens of Massachusetts; also Isaac H. Taylor, at the time of his insolvency and to the time of his death, resided at Boston (Record, folio 11, page 6). His wife and afterwards widow resided at Duxbury, in Plymouth County, Massachusetts. (Record, folio 13, page 7.)

The proceeds of the Alabama Claim were in Massachusetts in the form of a draft of the treasurer of the United States, dated Feb. 20, 1885, and mailed the same day to plaintiff in error, and others, the attorneys of record at Boston, and

received in due course of mail previous to the death of said Isaac H. Taylor, payable to the order of Isaac H. Taylor, and directed to the assistant treasurer of the United States at Boston, Mass., for payment; and the proceeds of said draft, after the death of Taylor, were in the hands of the plaintiff in error. (Record, Exhibit B, folio 15, page 8.)

The Alabama Claim of Isaac H. Taylor and its proceeds were assets in the jurisdiction of Massachusetts where the right to it had vested in the assignee before Taylor's death.

Gorely, Assignee, *v.* Butler, 147 Mass. 8.

The power of the State to control the acts of its citizens in other jurisdictions and its power *in persona* over persons in its jurisdiction to compel them to do acts in respect to property situated without the jurisdiction is expressly approved in Cole *v.* Cunningham, 133 U. S. 107, and cases cited by the Chief Justice. No one had any right to take the draft out of the jurisdiction.

It is immaterial where the draft was actually cashed, whether at Washington or Boston, as the fund in the Treasury is located as much in Boston as in Washington.

Vaughn *v.* Northup, 15 Peters, 1.
Wyman *v.* Halstead, 109 U. S. 654.

The agreed facts (Record, folio 14, page 7) show that Gorely called on Butler, at Boston, before Mrs. Taylor applied for administration in the District of Columbia, demanded of him the draft, and then notified him he was the assignee in insolvency of Isaac H. Taylor, and entitled to the draft and its proceeds. The plaintiff in error, a citizen of Massachusetts, notwithstanding, collected the draft and retains the proceeds (Record, folio 13, page 7). Mrs. Taylor had no right to the draft or its proceeds as

against the assignee, and Butler was liable to defendant in error.

Elliot *v.* Swartout, 10 Peters, page 157.
Jefts *v.* York, 12 Cush. 196.
Wilson *v.* Smith, 3 Howard, 769.
Quimby *v.* Carr, 7 Allen, 417.

On these facts we claim the jurisdiction of Massachusetts, *in persona*, over the parties is good.

We also claim that the *res* was in the jurisdiction of Massachusetts when this suit was brought.

Waiving the consideration of Gorely's right as assignee, it cannot be contended that anyone had, after Taylor's death, the right to withdraw this draft from administration here, and transfer its proceeds to the District of Columbia for ancillary administration.

3 Redfield on Wills, page 29.

Since the Act of Congress of June 24, 1812, foreign administrators have had the right to sue in the District of Columbia, without taking letters there.

Kane *v.* Paul, 14 Peters, 33.
Vaughn *v.* Northup, 15 Peters, 1.

On Taylor's death Butler's attorneyship expired. It was his duty on demand from the assignee to deliver the draft to him.

The State Court has decided Butler shall deliver the funds to the assignee in insolvency, and no error is assigned as to its jurisdiction over the parties or the *res*.

The Alabama Claim of Isaac H. Taylor was a right of property against the United States.

The Treasury is located in common in Massachusetts and other States of the Union, consequently the deed of assign-

ment of the Judge of Insolvency transferred and vested, *ipso facto*, the right in the assignee. See Crapo *v.* Kelly, 16 Wal. 618, on the principle avowed by both the majority and dissenting justices.

III.

Errors Assigned.

The following as errors were assigned by the plaintiff in error. (Record, folio 23, page 12.)

"I. That the State court, against the contention of the defendant, held and declared that the laws of insolvency of the State could and did affect, assign, and transfer the claim of Isaac H. Taylor against the United States, being in the form of an adjudication of the Court of Alabama Claims, as against his widow, his administratrix, in the District of Columbia."

"II. That the State court decided, against the contention of the defendant, that the insolvent law of Massachusetts transferred the property of said Isaac H. Taylor, to wit, a claim against the United States, evidenced by an award by the Court of Commissioners of Alabama Claims."

"III. That the State Court decided, against the contention of the defendant, that the insolvent laws of Massachusetts as enforced took effect upon the person and property of said Isaac H. Taylor as a system of bankruptcy in contravention of the Constitution and laws of the United States."

It may be doubted whether anything in the record will sustain the assignment of errors numbered 1 and 2. The record does not show what law or clause in the Constitution of the United States was drawn in question before the State Superior Court, and a decision made adverse to the right claimed by him under it.

With regard to the third assignment of errors, it is admitted that the record shows that the assignee's title arose under the insolvency laws of Massachusetts, but the record does not show that the plaintiff in error objected to their validity as interfering with the Constitution of the United States.

The Supreme Court of Massachusetts decided in 147 Mass. page 10, in this case, that the Alabama Claim of said Taylor was property within the purview of the insolvent laws of Massachusetts, and within the general intent of the Public Statutes of Massachusetts, Chap. 157, Sects. 44 and 46, and that the plaintiff in error should pay to the assignee, Gorely, the proceeds admitted to be in his hands.

The first error assigned is that the Court in Massachusetts declared the laws of insolvency affected, assigned and transferred the said claim of Isaac H. Taylor, in insolvency, to his assignee, Gorely, as against his widow, the administratrix, in the District of Columbia.

The question before the Court was on the title to the proceeds of the claim which the plaintiff in error had received.

The title of Gorely, the assignee, accrued before the

The authority of a State to bind persons and property in their limits, when the obligation of contracts is not impaired thereby, is broadly declared in

Denny *v.* Bennet, 128 U. S. 474.

Walworth *v.* Harris, 129 U. S. 363.

Brown *v.* Smart, 145 U. S. 457.

lows, Chapter 157 of the Public Statutes of Massachusetts: —

"Sect. 44. The judge shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the debtor, except such as is by law exempt from attachment, and all his deeds, books, and papers relating thereto."

"Sect. 46. The assignment shall vest in the assignee *all the property* of the debtor, real and personal, which he could have lawfully sold, assigned, or conveyed . . . all debts due to the debtor or any person for his use, and all liens and securities therefor, and all his rights of action for goods or estate, real or personal, and all his rights of redeeming such goods or estate."

"Sect. 51. He" (the assignee) "shall have the like remedy to recover all the estate, debts, and effects in his own name, as the debtor might have had if no assignment had been made."

Looking at the record (Folio 6, page 3, and Folio 11, page 6) the deed in fact conveyed Taylor's estate to Gorely, assignee. See also the Deed in the Appendix

See Williams *v.* Heard, 140 U. S. p. 540.

The Supreme Court of Massachusetts have decided Gorely took the claim by the assignment, 147 Mass. 10. The decision of the Alabama Commissioners is not final to determine who is entitled to receive. "The ownership of the claim did not concern the Court."

Williams *v.* Heard, 140 U. S. 535, at page 539.

Gratuities.

The plaintiff in error may suggest that the Alabama Act of 1882 was a gratuity, but if so the gift vested in Taylor before his petition in insolvency and passed to the assignee.

Gorely *v.* Butler, 147 Mass. 11.
Clark *v.* Clark, 17 Howd. 315.

The question is not now open.

Williams *v.* Heard, 140 U. S. 535,

decides these acts were not gratuities and refers to numerous others of the decisions of this Court of like effect. It is settled. The decision of the Supreme Court, 147 Mass. 8, is in harmony with the construction adopted by this Court.

Taylor's right had vested before it was assigned to Gorely, and Gorely took it in the life of Taylor.

This Court sitting in error does not entertain jurisdiction over the decisions of the State Courts on the effect of State Laws of Insolvency on citizens of the State, unless they are alleged to be in conflict with the Federal Constitution or laws.

Second Error.

The second error assigned is in substance that the deed of assignment to Gorely was void because of Sect. 3477 of the Revised Statutes of the United States as to assignment of claims against the United States. The intent and effect of this section has been often before this Court.

It was considered by the Court in Trist *v.* Child, 21 Wal. 441, where the Court recognizes the section does not apply to "devolution of title by force of law without any acts of the parties, or involuntary assignments, compelled by law, which may have been in view."

The Court again considered this question, U. S. *v.* Gillis, 95 U. S. page 416, a Court of Claims case. The Court say that "there are devolutions of title by force of law, without any act of parties, or involuntary assignments, compelled by law, which may have been in view." The question arose in

Erwin *v.* U. S., 97 U. S. 397 to construe this Sect. 3477 and the Court expressly said: —

"It does not embrace cases where there has been a transfer of title by operation of law. The passing of claims to heirs, devisees or assignees in bankruptcy are not within the evil at which the statute aimed; nor does the construction given by this Court deny to such parties a standing in the Court of Claims."

This is not *obiter dictum* of this Court, but is the direct answer to the first point of the appellant's argument in the case.

The Supreme Court of Massachusetts cite this case with manifest approval of, and allegiance to, its doctrine. The question came up on a voluntary assignment for the benefit of all the creditors in 1880, Goodman *v.* Niblach, 102 U. S. 559 where the claimant had made under the laws of New York a general assignment of all his effects. It was held valid and not within the purview of Sect. 3477. The Court says, page 560, "In what respect does the voluntary assignment for the benefit of his creditors, which is made by an insolvent debtor, *of all his effects*, which must, if it be honest, include a claim against the Government differ from the assignment which is made in bankruptcy?" . . . "We cannot believe that such a meritorious act as this comes within the evil which Congress sought to suppress by the Act of 1853."

The Court indorses its former decisions on this section.

The title by devolution to an administrator is recognized, also, and the discretion of the Treasurer of the United States to whom he shall pay an ascertained fund, whether to the administrator in chief or ancillary.

Wyman *v.* Halstead, 109 U. S. 657.

Taylor *v.* Bemis, 110 U. S. 42.

The exposition of Sect. 3477 in the Gillis, the Trist and the Erwin cases is consonant with the enlarged description of its policy in Goodman *v.* Niblach.

When the voluntary assignment for the benefit of all his creditors carries the title to the claim, how can it be contended that the petition for the benefit of the insolvent laws of Massachusetts, and the compulsory assignment by the Court of all the insolvent's property to the assignee will not also be valid. The Court, in Gorely *v.* Butler, 147 Mass. 8, decided that the title did pass by the insolvent laws of that State to Gorely, assignee; and this Court has decided that Sect. 3477 does not prevent similar devolutions by force of law or by voluntary assignment of the title of a claimant for the benefit of all his creditors.

To like effect also is

Williams *v.* Heard, 140 U. S. 540.

It is worthy of note that in 1884, St. Paul Railroad *v.* U. S., 112 U. S. 734, where the Supreme Court enforced Sect. 3477, it took pains to reaffirm (see page 736) its adhesion to the doctrines in Erwin *v.* U. S. and also Goodman *v.* Niblach. The latter case is also cited with approbation in the opinion in Bailey *v.* U. S., 109 U. S. 437.

Third Error.

The third error assigned is the unconstitutionality of the State insolvent laws.

The course of decisions of this Court all favor their constitutionality.

Sturgis *v.* Crowninshield, 4 Wheaton, 122,
Ogden *v.* Saunders, 12 Wheaton, 213,

decide that the power to pass bankrupt laws is not exclusive in Congress.

Also see

1832. Boyle *v.* Zacharie & Turner, 6 Peters, 348.

"Whatever principles are established in Justice Johnson's opinion in 12 Wheaton, 213, are to be considered as the settled law of the court."

1847. Cook *v.* Moffatt, 5 Howd. 307, was a divided opinion. The constitutionality of State laws of insolvency, where no concurrent legislation of Congress exists at the same time, was reaffirmed by all the judges.

1863. Baldwin *v.* Hale, 1 Wal. 223,
Baldwin *v.* Newbury, 1 Wal. 234,
Gilman *v.* Lockwood, 4 Wal. 409

are all to the effect that the States can pass insolvency laws provided there be no act of Congress establishing a uniform system of bankruptcy conflicting with their provisions.

1854. In the Bank of Tennessee *v.* Horn, 17 Howd. 157, the constitutionality of the insolvent laws of Louisiana were sustained.

In Geilinger *v.* Philippi, 133 U. S. 246, the insolvent laws of Louisiana were enforced against foreign creditors.

In Crapo *v.* Kelly, 16 Wal. 618, those of Massachusetts also were sustained.

This Court, while affirming the power of States in insolvency, have said also: —

"The insolvent laws have no extra territorial jurisdiction, and many cases have arisen as to the bounds of the jurisdiction of the State Court to pass beyond their own limits and their own citizens and act on the rights of citizens of other States."

Ogden *v.* Saunders, 12 Wheaton, 213.

Cook *v.* Moffatt, 5 Howard, 307.
Baldwin *v.* Hale, 1 Wallace, 223.

In the following cases the constitutionality of the system is recognized: —

Cunningham *v.* Cole, 133 U. S. 107.
Geilinger *v.* Philippi, 133 U. S. 246.
Brown v Smart 145 U.S. 457

EXCLUSIVE POWERS OF CONGRESS.

The cases of

Wabash Co. *v.* Illinois, 118 U. S. 557,
Leisy *v.* Hardin, 135 U. S. 100,

on the power to regulate commerce have no bearing on the question at bar. The majority of the Court, vol. 118, page 574, expressly state that an arbitary rule would be useless.

"It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved."

There is no general principle in these cases that applies to the well settled position of this tribunal on the insolvent laws which it has recapitulated in Cole *v.* Cunningham with an unshaken approval.

This case of *Leisy* was followed by an Act of Congress, August 8th, 1890, withdrawing the protection of the commerce clause from imported wines and liquors. A case arose on the following day in Kansas and on application for a writ of Habeas Corpus came before this court.

In Re Rahrer, 140 U. S. 545.

The suggestion was that as the Kansas law was void for unconstitutionality it required to be re-enacted to become operative.

This Court said (page 562) their decision did not annul but limited the operation of that law (and page 565), that the Act (of Congress) removed the obstacle, and we perceive no adequate ground for adjudging a re-enactment of the State law was required."

Following the same chain of reasoning the repeal in 1878 of the uniform bankrupt law of the U. S. removed an obstacle to the non-uniform State insolvent laws, and no re-enactment was needed to give them effect.

Respectfully submitted,

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